CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

AUGUST TERM, 1871, AT ST. JOSEPH.

JEREMIAH TINGLEY *et al.*, Respondents, *v.* RACHEL COWGILL *et al.*, Appellants.

1. *Will, suit to contest validity of — Issues framed — Construction of statute — Burden of proof on whom.* — In a proceeding under the statute to contest the validity of a will, it is error for the court to refuse, on motion of counsel, to frame an issue for the jury as to whether or not the writing produced was the will of the testator. (Wagn. Stat. 1368, § 29.)

   In such a suit the *onus* is on the defendants who seek to establish its validity, and they are entitled to open and close.

2. *Will, suit to contest validity of — Wife may testify in.* — In an action to contest the validity of a will, the wife is not precluded from testifying by reason of anything contained in the statute concerning witnesses (Wagn. Stat. 1372-3, §§ 1-5). That act contemplates cases where the husband is the real party in interest; whereas, in the case supposed, the wife is the real and the husband merely a nominal party.

3. *Wills — Undue influence — Bad treatment of children, proof touching.* — Mere bad treatment of children, exerted or exercised by the wife many years previous to the making of a will, although coupled with their disinheritance by the testator, does not necessarily furnish a reason for impeaching its validity. It should be followed up by proof showing that undue influence was acquired by her in consequence, and that the influence continued down to the time when the will was executed.

4. *Witnesses — Medical men cannot give opinions as to the merits of a cause.* —Medical men, when called as scientific witnesses, cannot give their opinions as to the merits of a cause, but their opinions must be predicated upon the facts proved. Where, however, the facts are doubtful, they may be asked their opinion upon a case hypothetically stated.

5. *Will, suit to invalidate — Testator, declarations of.*—In an action to contest the validity of a will, declarations of the testator made before the date of the will are inadmissible. (Gibson v. Gibson, 24 Mo. 227.)

Appeal from Linn Circuit Court.

***Hall, Broaddus et al.*, for appellants.**

I. The court committed error in refusing to direct an issue to be made up in accordance with the prayer of the petition, whether the writing purporting to be the will of John Cowgill, deceased, was his will or not. (Wagn. Stat. 1368, § 29.)

II. The parties sustaining the will held the affirmative and were entitled to open and close the case. The history of the proceedings shows that the defendants were injured by refusing them this right. (Gen. Stat. 1865, p. 529, § 17; *id.* 530, § 29; 28 Mo. 19; 13 Ill. 15; 5 Ohio, 279; 11 Ohio St. 329; 1 B. Monr. 391–2, 397; 2 Gray, 526; 1 Redf. Wills, 30–1; 2 Greenl. Ev., § 689; 1 Greenl. Ev., § 77; Wagn. Stat. 1366, § 17.)

III. Neither Mrs. Tingley nor Mrs. Hammond nor Mrs. Hearne were competent witnesses in this case. Their husbands were parties to the suit. Our statute concerning witnesses is explicit that a married woman shall not be a witness in a civil suit to which her husband is a party, except in the cases therein mentioned. These exceptions do not extend to or include the evidence of Mrs. Tingley and Hammond and Hearne in this suit. (Gen. Stat. 1865, p. 587, § 5; 20 Ind. 150; 28 Ind. 88; 25 Ind. 106; Wagn. Stat. 1373, § 5.)

IV. The evidence with reference to Mrs. Cowgill's treatment of her step-children was incompetent and inadmissible. The bad treatment of the testator, or of his children by his wife, is no evidence of undue influence in procuring the execution of his will. If such evidence is entitled to any weight, it is evidence that the will was not procured by the influence of the wife. Such con-

duct would naturally and ordinarily weaken a wife's influence, and occasion a feeling of resentment on the part of the husband toward his wife, and not of affection for him. (20 Penn. 11, 330.)

V. The conversations of the testator were not competent; they were had long anterior to the date of the will. It is admitted that they were not evidence of any facts stated by the testator. To say that they were admissible for the purpose of showing the state of testator's mind twenty years before the will in suit was made, is to evade a plain principle of law by a bold and flimsy pretext. (26 Mo. 228, 237.)

Woodson, Ray, Mansur, Collier et al., for respondents.

I. Section 29 of the act on wills does not say how the issue shall be made up. The practice of the courts has not been uniform on this subject; and it is only a matter of practice, for which a reversal will not be had, even if error was committed therein. Section 1, article IX, of the practice act tells us how issues are made up. It declares that "issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other." The pleadings in this cause were made up under the direction of the court, and the issues arose upon the allegations and denials, as in other causes. Besides that, the court, in its instructions to the jury, plainly made up the issue and submitted the same to the jury for trial. (32 Mo. 420.)

II. Plaintiff was entitled to open and close. (See Wade v. Scott, 7 Mo. 514; Farrell's Adm'r v. Brennan's Adm'x, 32 Mo. 328 or 332; McClintock v. Curd *et al.*, 32 Mo. 411; Comstock v. Hadlyme Ecclesiastical Society, 8 Conn. 254; Marshall *et al.* v. Wills *et al.*, 7 Wis. 1; Rich v. Jones, 9 Cush. 329; Hill. New Trial, 107, §§ 19–21, and authorities cited, and also same authority as to form of verdict.)

III. Mrs. Tingley and the other female plaintiffs were the real parties in interest, and their husbands merely nominal ones. In such a case they testify in their own behalf, and not for or against their husbands, who are merely nominal parties. (See Hooper v. Hooper, 43 Barb., N. Y., 292; Gee v. Lewis *et al.*,

20 Ind. 149; 15 Wis. 246; 9 Gray, 72; White v. Stafford, 38 Barb., N. Y., 424; 20 U. S. Dig. 981, § 156.)

IV. As to the admissibility of declarations made by testator, long before and after the time of making the will, there was no error. (Dennison *et al.*, 29 Conn. 399; Calvin v. Warford, 20 Md. 357; Hull *et al.* v. Potter *et al.*, 40 Penn. St. 483; Beaubien v. Cicotte, 12 Mich. 459; 1 Redf. Wills, 536, § 51, and authorities cited; *id.* 542, § 6.)

V. As to undue influence, see 12 Mich. 459; 20 Mo. 306; 20 Md. 357; 20 Penn. 475; 46 Mo. 147; 27 Iowa, 111; 11 U. S. Dig. 471, §§ 5–7, 9–10; 46 Mo. 147; Harrell v. Harrell, 1 Duvall, Ky., 203; 1 Redf. Wills, 506–512, note 14; *id.* 513–14; *id.* 542, § 6; *id.* 545, *d*; *id.* 514, §§ 12, 14; *id.* 518, § 18; *id.* 520, § 24; *id.* 536–7, §§ 52–3; 11 U. S. Dig. 471, §§ 5–10, 31.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding under the statute to contest the validity of the will of John Cowgill, deceased, which had been admitted to probate in the Probate Court of Livingston county. From the record it appears that the testator had been twice married, and had two sets of children, eight in all, four by the first marriage and the same number by the second. At the time of his death the children were all grown. By the disposition of his property made in his will, he devised and bequeathed all his property to his wife Rachel and her son Henry, and the remainder of the children were substantially disinherited, receiving nothing but mere nominal shares. The reasons stated in the petition for contesting the validity of the will are that the testator, when he made and executed the same, was not of sound and disposing mind, and that it was obtained by fraud and undue influence exercised upon him by Rachel and Henry, the devisees. These allegations are explicitly denied in the answer. Upon the trial of the cause the defendants moved the court to have an issue made up and framed as to whether the writing produced was the will of the testator or not. This the court refused to do, and this refusal is assigned as the first ground of error. The statute is plain and express on

the subject. It provides that if any person, by petition to the Circuit Court, shall contest the validity of a will, an issue shall be made up to be tried, as to whether the writing produced is the will of the testator or not. (2 Wagn. Stat. 1368, § 29.) I think the court clearly erred in not complying with the request. Under a similar statute in Ohio the court say that the statute itself having prescribed the issue, it must be followed. (Green v. Green, 5 Ohio, 279.)

The defendants further requested that they should be allowed to open and close the case to the jury, but the court denied them that privilege and awarded the opening and close to the plaintiffs. Upon this point there is not an entire uniformity in the practice, and the decisions in this as well as in other States are conflicting. The issue in these cases is whether the writing produced is the will of the testator or not, and the *onus* or burden of proof is cast upon the defendants who seek to establish its validity.

In the case of Cravens v. Falconer, 28 Mo. 19, it was decided by this court that, as the burden of proof rested upon the defendants, they had the right to open and close the case to the jury.

In Farrel's Adm'r v. Brennan's Adm'x, 32 Mo. 328, the judge delivering the opinion expressed doubts as to the correctness of the ruling in Cravens v. Falconer, and was inclined to the view that the plaintiffs, or the party attacking the will, should be allowed to open and close; but he said that an error in that respect furnished no ground for a new trial, unless the party had been materially injured thereby. When the issue is made up, the defendants, endeavoring to establish or hold under the will, affirm that the paper writing is the last will and testament of the testator. They then have the affirmation of the issue to be tried, and are entitled to open and conclude.

In my judgment the case of Cravens v. Falconer enunciates the correct doctrine, and is supported by the best reasoned cases decided elsewhere.

Mrs. Tingley and Mrs. Hammond were married daughters of the testator, and they and their husbands were plaintiffs of record in the cause. An objection was raised that Mrs. Tingley and Mrs. Hammond being married women and joined with their

husbands, were incompetent to testify. But this objection was overruled, and they were permitted to give evidence. Whether their testimony was admissible depends upon a construction of our statute in reference to witnesses.

The first section of the statute removes the common-law disability in regard to parties to the record testifying in their own behalf. The fifth section provides that no married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to-wit: first, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; second, in actions against carriers, so far as relates to the loss of property and the amount and value thereof; third, in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband. (2 Wagn. Stat. 1372–3, §§ 1–5.)

It is now contended that, as the witnesses do not come within either of the enumerations in section 5, which expressly authorize a married woman to give evidence when joined with her husband, they must necessarily be excluded. But I do not think that such a ruling would carry out either the meaning or spirit of the statute. The first section permits every party to the record to give evidence. Now, in the case at bar, the real parties are the married women, the cause of action rests in them, and without them the husbands would have no interest. They are the parties, and although the law authorizes the joinder of the husbands, still the husbands are merely nominal parties, as they are not heirs at law. Under such circumstances I think that Mrs. Tingley and Mrs. Hammond were parties entitled to give evidence within the meaning of the first section of the statute, and such has been the ruling of the courts in the States having the same statutory provision. (Hooper v. Hooper, 43 Barb. 292; Barber v. Goddard, 9 Gray, 71; Gee v. Lewis, 20 Ind. 149; Robinson v. Hutchinson, 31 Verm. 509.)

The evidence admitted, of bad treatment of the children of the first marriage by Rachel, at the time and shortly after her mar-

riage with the testator, will now be noticed. This evidence was of facts transpiring many years previous, whilst the parties lived in Indiana. The testimony tended to show that Rachel discriminated against her husband's children by his first marriage, in favor of her own, and that she treated them harshly and rudely. But it is not shown that she acquired an undue influence over her husband's mind, or that she succeeded in alienating his affections from his elder children. Bad treatment of the children exerted or exercised many years previous to the making of the will, taken singly and disconnected, does not necessarily furnish a reason for impeaching its validity. Such conduct by a stepmother would operate on different persons in different ways. On some it might have a tendency to produce an injurious influence, whilst on others it would have a directly opposite effect. But it may be presumed as a pretty correct proposition that general bad treatment alone is not sufficient; it should be followed up by proof showing the effect it had on the testator's mind. The essential characteristic of a good testament is that the mind of the testator in making it should be free and not influenced or moved by fear, fraud, or undue flattery. The constraint or unfairness, to avoid a will, must be operative on the mind of the testator at the time of making the will. Therefore harsh treatment, or even an exertion of influence long past and gone, and in no way connected with the testamentary act, cannot be allowed as evidence to impeach a will. Something more must appear: that undue influence was acquired in consequence of it, and that that influence continued down to the time the will was executed. In these cases, it is true, a wide range is permitted, as undue influence is seldom susceptible of direct proof, but must be gathered from facts and circumstances. But the bad treatment alone, when it occurred many years prior to the making of the testament, will not be sufficient.

It appears that the testator was addicted to the excessive use of opium, and that the opinions of medical witnesses were introduced for the purpose of showing the influence it had upon his mind.

This evidence, although objected to, was admitted. The

opinions of medical men, as men of science and as experts, are admissible in certain cases to show the nature, cause and influence of disease; but when they are called as scientific witnesses they cannot give their opinions as to the merits of the cause, but only their opinions on the facts proved; and where the facts are doubtful the witness may be asked his opinion upon a case hypothetically stated. The deposition of Dr. Barnes in respect to the influence, effect and mental derangement caused by the use of opium, was inadmissible. It was not founded on any hypothetical statement or agreement of facts in the case. It was the opinion of the deponent as to the incapacity of any man who should use opium a certain number of years. It was more in the nature of a medical treatise, general in its statements and manner of discussion, than an opinion of skill and science founded on facts either real or assumed.

A question has been made in regard to receiving the declarations of the testator made before the making of the will, but we do not deem it necessary to go into a discussion of that subject. The general doctrine was thoroughly considered by this court in the case of Gibson v. Gibson, 24 Mo. 227, and we see no reason for reviewing the elaborate decision there rendered.

As these views are decisive of the present disposition to be made of the case, it becomes unimportant to notice the misconduct of the juror and the audience attending upon court at the trial. As the judgment was for the plaintiffs, the result is that the same must be reversed and the cause remanded for a new trial in conformity with this opinion. The other judges concur.

MICHAEL ARTHUR, Plaintiff in Error, *v.* JOSEPH H. RICKARDS, Defendant in Error.

1. *Practice, civil — Pleadings — Demurrer, on ground that another suit is pending embracing same parties and cause of action, should be overruled.*—A demurrer to a petition, based on the ground that another suit was then pending between the same parties and for the same cause of action, when no such facts appeared in the petition, should be overruled.

Error to Clay Circuit Court.

Chandler & Sherman and *J. G. Woods*, for defendant in error.

I. This cause should be dismissed from this court, because the record shows no final judgment from which a writ of error will lie. (Whittel's Pr. 212, 407, 500.) The transcript of the record must show in this court that final judgment has been entered in the court below. (Collier v. Whedon, 1 Mo. 1; State, etc., v. Pepper, 7 Mo. 348; Horr v. Knighton, 9 Mo. 180; Robinson v. Morgan County Court, 32 Mo. 428.) An order dismissing a suit is not a final judgment from which a writ of error will lie (Miller v. Richardson, 1 Mo. 310), nor is an order merely sustaining a demurrer. (Robinson v. Morgan County Court, *supra*; Young v. Stonebreaker, 33 Mo. 117; Smarr v. McMaster, 34 Mo. 204; Adams, Adm'r, v. Trigg, 35 Mo. 190; State v. Gregory, 38 Mo. 501.) The essential form of final judgment on demurrer is given in Whittel's Pr. 212; Lisle v. Rhea, 9 Mo. 772; Jones v. Hoppie, 9 Mo. 173; Young's Adm'r v. Stonebreaker, *supra*, and note; State v. Gregory, *supra*.

II. The Circuit Court would and must judicially notice its own records. Proof of them would seem useless and even improper.

Hardwicke, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court.

The court sustained a demurrer to the petition and dismissed the suit. The judgment of dismissal was informal, but it was final and fatal to the plaintiff's action. The dismissal terminated the suit in the Circuit Court, and the plaintiff was compelled either to submit to the consequences or bring the cause here.

The defendant demurred upon the ground that another suit was then pending between the same parties and for the same cause of action. It is not pretended that the petition shows any such fact. The demurrer should therefore have been overruled.

The statute is clear and express on this point. (Gen. Stat. 1865, p. 658, § 6.)

Judgment reversed and cause remanded. The other judges concur.

MARGARET CARTER *et al.*, Plaintiffs in Error, *v.* JOHN A. ABSHIRE *et al.*, Defendants in Error.

1. *Deed of trust — Sale, notice of — "Public place," what is.* — The setting up of notice of sale on the sides of a public square in a town or city satisfies the requirement contained in a deed of trust that the notice should be put up in a "public place" in such town or city.

   The recitals by the trustee in his deed, that he put up the notices in "public places," are sufficient *prima facie* evidence of that fact.

2. *Deed of trust, sale under — When land should be sold in lump, when in parcels.* — When property for sale under a deed of trust will bring more by being sold in separate subdivisions, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. But he must sell it in the lump or in parcels, according as will be most beneficial for the debtor; and he will be held to a strict accountability for the exercise of the discretion devolved upon him.

3. *Fraud — Sale of land — Mere inadequacy of consideration not sufficient to charge fraud.* — Mere inadequacy of consideration in the sale of property, of itself, unless so gross as to furnish a reasonable presumption of fraud, would be no ground for the interference of equity.

Error to Fifth District Court.

J. F. Asper, for plaintiff in error, among various points urged, contended that the trustee did not strictly pursue his authority in the matter of notice. Putting up notices on four sides of the square was not putting them up in four public places in the city of Chillicothe. The court-house was more public, and it was usual to put notices on the door. People from all parts of the country visited there. The post-office, where all the people of the town went, and the railroad station, all would have been more public, and would have better served to bring the sale home to more people. (Denning v. Smith, 31 Johns. Ch. 332; Stein v. Wilkinson, 10 Mo. 75; Gray v. Howard, 14 Mo. 341; 1 Washb. Real Estate, 526–8; Powers v. Kueckhoff, 41 Mo. 425; 1 Sugd. Vend. 63.)

The consideration paid for the farm was totally inadequate. The case comes within the rule of Goode v. Comfort, 39 Mo. 313.

McFerran & Collier, for defendant in error.

I. The sale by Collier as trustee is not affected by the fact that the land was sold in a body, instead of the smaller legal subdivisions, in the absence of proof showing that it would have brought a higher price had it been sold in forty-acre tracts. (8 Mo. 460; 30 N. Y. 173.)

II. The title conveyed to Abshire by the trustee's deed is unaffected by fraud, negligence or injury to the plaintiff, and the plaintiff's petition is destitute of equity, considered in the light of the evidence in the cause. (2 U. S. Dig. 635, § 564; 4 Johns. 527.)

III. As to sustaining demurrer and motion to strike out, plaintiffs waived the same by pleading error. (Weldon's Adm'r v. Hobbs, 42 Mo. 537.)

IV. As to misjoinder in praying to set aside title for rents and profits and for possession, see 41 Mo. 257; 43 Mo. 139; *id.* 179.

WAGNER, Judge, delivered the opinion of the court.

A point is raised in reference to the action of the Circuit Court in its rulings with respect to the pleadings, but we see nothing in that regard requiring revision.

As the pleadings stood when the trial was had, the plaintiffs were enabled to go into, and did go into, their whole case. All the evidence they had was introduced and submitted, and, had it been deemed sufficient, would have entitled them, under the issues made, to appropriate relief.

The suit was in the nature of a bill in equity, seeking to redeem certain real estate situate in Livingston county, and to set aside a sale made by a trustee. From the record it is shown that L. R. Carter, on the 10th day of September, 1861, made and delivered to L. T. Collier, as trustee, a deed of trust on 240 acres of land, to secure to the Bank of the State of Missouri

the sum of $1,356.32, payable six months after date, with eight per cent. interest, and dated on the 13th day of September, 1861. Default having been made in the payment of the debt and interest, Collier, the trustee, at the request of the bank, advertised and sold the premises on the 22d day of February, 1864. At the sale Abshire became the purchaser of the land, paying therefor the sum of $1,600, and afterward, in April, 1866, he sold the same to Philip Swank for $5,000. Swank entered into possession, and has occupied the same ever since. Carter, the grantor in the deed of trust, died before the sale by the trustee took place, and this proceeding is instituted by his widow and legal representatives.

The grounds mainly relied on to invalidate the sale are, that the trustee did not give the requisite notice; that he sold the land in gross when he should have divided it and sold it in forty-acre lots; and inadequacy of consideration.

The deed of trust provided that the trustee, if he proceeded to sell, should give notice by setting up four written handbills in four public places in the city of Chillicothe. The trustee, in compliance with this provision, set up four written handbills on the four sides of the public square in Chillicothe. It is now contended in argument that there are places more public than the sides of the public square, and that would better impart notice. But no evidence was introduced of this fact, and the court cannot be expected to take judicial notice of it. It is not denied that the four sides of the public square are public places, and if so, the requirement in the deed is satisfied. The trustee in his deed recites that he put up the notices in public places, and, by the terms of the trust deed to him, his recitals are *prima facie* evidence of everything contained therein. Till they are rebutted or overcome by countervailing evidence, full faith and credit must be attached to them.

The next question is whether the action of the trustee in selling the land altogether, instead of separating and exposing it in subdivisions, is sufficient to render the sale void. A trustee, in exercising his duties and powers under a trust deed, is a trustee for the debtor, and is bound to act in good faith and adopt all

reasonable modes of proceeding in order to render the sale the most beneficial to the debtor. Therefore, where property will bring more by being separated when sold, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. (Gray v. Shaw, 14 Mo. 341; Goode v. Comfort *et al.*, 39 Mo. 313.)

But no general rule can be laid down for the government of trustees on this subject. In some cases the sale of an entire tract will be more judicious and better subserve the interest of the debtor than a division in parcels. A farm or a piece of real estate may derive additional value from its unity or entirety. In all such cases the trustee must act in a manner most beneficial to the debtor, and he will be held to a strict accountability for the exercise of the discretion devolved upon him.

In the present case there is nothing to show that the trustee was guilty of any abuse, or that he used his discretion unwisely or unsoundly. The evidence that the property in mass sold for as much or more than it would have brought had it been divided, is very strong, and I think greatly preponderates. As there was no direction or provision in the deed directing absolutely that the land should be sold by subdivisions, I am of the opinion that the power was well executed, and that the trustee did the best that he could under the circumstances.

There is nothing to justify the interference of a court on the ground of inadequacy. Mere inadequacy of itself, unless so gross as to furnish a reasonable presumption of fraud, would be no ground for interference.

The sale was made when a general depression prevailed in the value of property. But the evidence goes to show that it brought about its marketable price at the time. It rose greatly afterward, but that fact cannot be taken into consideration to affect the validity of the sale. The debt was long past due, and the bank had the right to coerce its payment. The time selected was unfortunate for the debtor, but it does not appear that any improper practices were indulged in, either by the creditor, the trustee, or the purchaser. Whilst these sales should be watched with all strictness, yet titles acquired under them should not be unnecessarily disturbed or ruthlessly invaded.

It has been further argued that the Carters were lulled into security and deceived by the bank promising to give further time before it enforced the collection of the debt. It seems that after the death of Carter the family, with the exception of one son, moved to Pennsylvania, where they had an estate. That son requested the officers of the bank, long after the debt was due, to wait for the money till it could be procured from Pennsylvania, and they told him that they would wait six months. They did wait that length of time and more, and then proceeded to take measures to collect their debt. The promise was a mere gratuity, but it was fulfilled and observed. The plaintiffs were neither deceived nor misled. They were apprized of the sale, and their neglect contributed to the loss if any. The lower courts found for the defendants, and I think their judgments should be affirmed.

Affirmed. Judge Bliss concurs. Judge Currier absent.

JOHN CALHOUN *et al.*, Appellants, *v.* WILLIAM M. ALBIN *et al.*, Respondents.

1. *Bills of exchange and promissory notes — Payee indorsing without recourse, who re-acquires after maturity, subject to antecedent equities.* — The payee of a promissory note, who re-acquires it after indorsing it over without recourse, then stands in the position of an ordinary transferee. And where the note is re-acquired after maturity, he takes it like any other assignee of non-negotiable paper, subject to all antecedent equities. And his rights are not enlarged by the fact that he claims as payee, and not as transferee or indorsee. Thus, where the makers and indorsers of a note were firms having a common member, the assignee after maturity, of the indorser, could not at law sue the makers, even though he had previously been payee of the note, and claimed as such.

Appeal from Buchanan County Common Pleas Court.

B. F. Loan, for appellants.

I. As payees of the note sued, the plaintiffs below had a right to strike out all indorsements on said note, and sue as payees. (Glasgow v. Switzer, 12 Mo. 395.)

II. As holders of said note they had a right, under the statute, to sue in their own name.

Hall & Oliver, and *Hill & Ensworth*, for respondents.

I. After the note in suit had been transferred to Strong for the use of the Union Printing Company, that company could not have sued on it in a court of law. Sherwood was a member of the firm of P. Bliss & Co., the maker of the note, and was also a member of the Union Printing Company. To permit one of these companies to sue the other in a court of law, would be to permit a man to sue himself. The right of action on the note in suit was thus suspended while the Union Printing Company held it. The rule is that personal action once suspended is extinct. (5 Pet. 311; Hill v. McPherson, 15 Mo. 204.)

II. The note in suit having been transferred to plaintiffs after it became due, the plaintiffs could obtain no greater right than Strong or the Union Printing Company had. And as the Union Printing Company could not maintain this suit, it could not give the plaintiffs the right to maintain it. (3 Kent, 123.)

III. The evidence and pleading both show that the note sued on was, after maturity, indorsed and transferred in full by written indorsement thereon. The plaintiffs could not, by striking out such an indorsement, invest themselves with the legal title so as to bring suit in their own name, the note being past negotiability. (See Davis v. Christy, 8 Mo. 569; Finney v. Turner, 10 Mo. 209; Billings v. Atchison, 15 Mo. 70; 3 Kent, 123.)

CURRIER, Judge, delivered the opinion of the court.

This suit is brought against the firm of P. Bliss & Co., to recover the amount claimed to be due upon the firm's negotiable promissory note to the plaintiffs. The plaintiffs sue as payees, although it appears that the note is in fact held by them as the assignees of a business firm known as the Union Printing Company. The note was drawn by the firm of P. Bliss & Co. to the order of the plaintiffs, and was by the plaintiffs, at its maturity, indorsed in full and delivered to J. W. Strong for the use and benefit of the Printing Company.

The plaintiffs indorsed it without recourse, and received as a consideration for the transfer, the Printing Company's note for a like amount. Subsequently to this, and when the note was past due and uncurrent, the plaintiffs, at the instance of the Printing Company, took the note back, and now profess to hold it as collateral to the note of said Printing Company, although they admit that the latter note is good without any collateral support.

Sherwood, one of the members of said Printing Company firm, is also a member of the firm of P. Bliss & Co., and is joined as a defendant in this suit.

These facts appear from the pleadings and evidence, and are not in dispute. Upon the facts as thus recited, can the plaintiffs maintain this suit?

It is obvious that the plaintiffs transferred all their right, title and interest in the note sued on, when they indorsed it to the Printing Company, and that, as their indorsement was in full and without recourse, they had no further concern with the note as original parties to it. They were as clear of it as though the note had been payable to a stranger and had never passed through their hands. Therefore, when the note came back to them they received it as would any other transferee, and not because of their prior relations to the note, either as payees or indorsers.

Nor are their rights enlarged by the form of the suit, by suing as payees, and not as the Printing Company's indorsees or transferees. By the re-acquisition of the note they succeeded to the rights and remedies of the Printing Company and to nothing more. But the Printing Company had no remedy upon the note in an action at law, but only in equity, where the equities of the parties could be considered and adjusted. But this is an action at law, and the plaintiffs are cut off from this mode of redress, since their assignors had no such remedy. They stand in the attitude of assignees of non-negotiable paper. Any action they might bring upon the note was subject to the same objections and defenses that might be urged against an action in the name and favor of their assignors. The assignment created no new right of action. This point was definitely settled in Hill v. McPherson, 15 Mo. 204.

Moreover, it is quite apparent from the record that the present suit is in fact prosecuted in the interest of the Printing Company, and that it is so prosecuted in the name of the plaintiffs as a mode of avoiding defenses that might be made against an action brought in the name of said company. Such arrangements are not favored by the courts.

The Printing Company was debarred from maintaining an action at law upon the note against P. Bliss & Co., because of the composition of the two firms. The defendant Sherwood being a member of both, could not join in an action at law against himself. It has already been shown that the plaintiffs are subject to the same disabilities as were their assignors. The form of the assignment is unimportant. The plaintiffs were the original payees, and the endeavor was to revest them with title by erasing the indorsements upon the back of the note and a delivery of it back to them. That was at best but a mode of effecting an assignment, and the plaintiffs took as assignees of the Printing Company.

Since the plaintiffs cannot recover upon the facts shown by the record, it is unnecessary to notice the instructions. The plaintiffs took a nonsuit, and as a reinstatement of the case would be of no avail to them, the judgment will be affirmed. Judge Wagner concurs. Judge Bliss not sitting.

ANDREW MURRAY, Appellant, *v.* DAVID ROBERTS, Respondent.

1. *Administrator — Settlement by, has the force of a judgment, when.*—The final settlement by an administrator of his administration accounts, and the allowance of a balance in his favor by the Probate Court, has the force of a judgment, and is conclusive upon all parties till reversed or set aside by some proper proceedings.

Appeal from Clay County Circuit Court.

The appellant filed his petition in the Clay Circuit Court against respondent, as administrator of the estate of Robert C. Thompson, deceased. The petitition stated that plaintiff was former

administrator of the estate of said Thompson, and as such, in the year 1864, made a final settlement of said estate, and that on said settlement there was due him the sum of $1,100, and he was credited for that amount; therefore he prays judgment for said sum of money. The respondent filed a demurrer to the petition, which was sustained by the court.

S. Hardwick, for appellant.

The final settlement of Murray was a judgment, and notice having been published, was binding on all concerned. (35 Mo. 158, 163; 9 Mo. 362; 20 Mo. 87; 23 Mo. 95; *id.* 236.) It is objected that a balance cannot be allowed to an administrator on his settlement. In Caldwell v. Lockridge, 9 Mo. 362, 365, a balance was allowed the administrator on final settlement, he resigning his letters, as in this case; and this court decided that it was a judgment in his favor, and could not be set aside by a subsequent order of the court, the administrator being out of court. It is submitted that the cases of Frost v. Winston, 32 Mo. 489; Wyatt v. Woods, 31 Mo. 351, and Gillett v. Camp, 23 Mo. 375, relied on by counsel for defendant, are not in point; these were cases of guardians against wards. In Wyatt v. Woods, *supra*, the court declare that they are liable to be bound as apprentices if there is no estate. This could not be done with a deceased person.

J. E. Merryman, for respondent.

The court did not err in sustaining the demurrer, because: 1. The settlement of an administrator, and a balance found due him, on a general publication of notice, is not such a judgment as will authorize the institution of a suit thereon. The notice is only constructive service, and no one was in court on personal service; therefore the judgment is not final or binding on the parties interested. (Gillett v. Camp, 23 Mo. 375.) And this was a suit on a final settlement of guardian. 2. The administrator cannot recover for a balance due him on settlement of the estate, for the reason that, in law, he is not bound to pay out money on claims against the estate until he has money in his

hands belonging to the estate. Therefore the payments are voluntary, and no action lies to recover it back from the estate. And the petition fails to state that the payments made by the plaintiff were made under any order of the court, without which he had no authority to pay. (See Frost v. Winston, 32 Mo. 489; 31 Mo. 351.) 3. The settlement of the administrator being only an account, and more than five years having elapsed, is bound by the statute of limitations, and that being apparent on the pleadings, can be taken advantage of by demurrer. (McNair v. Lott, 25 Mo. 182.)

CURRIER, Judge, delivered the opinion of the court.

The final settlement of an administrator of his administration account, with the allowance of a balance in his favor by the Probate Court, has the force of a judgment, and is conclusive upon all parties till reversed or set aside by some proper proceedings. (Caldwell v. Lockridge, 9 Mo. 358; Barton v. Barton, 35 Mo. 158.) The court below held the contrary view, and sustained a demurrer to the plaintiff's petition.

The judgment must be reversed and the cause remanded. The other judges concur.

WILLIAM BURT, Respondent, *v.* W. H. AND ADELE RYNEX, Appellants.

1. *Chancery — Jury — Issues of fact, submission of to a jury.*—In chancery cases it is better for the court to try the whole case than to submit issues of fact to the jury. But under the statute such issues may, in a proper case, be so submitted. And the exercise of the discretion is not ground for error unless the party has plainly been injured by it. But the court is not bound by the finding, as it would be by a verdict at law. It may adopt it or not, in its discretion.

Appeal from Linn Circuit Court.

A. W. Mullins, for appellants.

This was not a case in which the opinion of a jury could properly be taken. (Wagn. Stat. 1041, § 13; Morris v. Morris,

28 Mo. 114.) Even if this had been a case in which issues might properly have been submitted to a jury, the issues here are not such as are authorized by the statute.

F. D. Burgess and *G. W. Easley*, for respondent.

The issues were properly made up and submitted to the jury. (Gray v. Payne, 43 Mo. 203.) As to the proper mode for framing issues and the trial thereof, see Morris v. Morris, 28 Mo. 114; McCullough v. McCullough, 31 Mo. 226.

WAGNER, Judge, delivered the opinion of the court.

Burt, the plaintiff, instituted suit against H. H. T. Grill, Jacob A. Lemon and William H. and Adele Rynex, to set aside a deed of conveyance of certain lands, executed by Burt to Lemon in April, 1861, and also a deed of the same lands from the sheriff of Linn county to the defendant, Adele Rynex, dated in April, 1863, and to obtain by a decree of court the title to the lands in himself. Lemon was never served with process, and made no appearance in the suit. Grill demurred on the ground that he was not a proper party, and the demurrer was sustained. The suit was then carried on to final judgment against W. H. and Adele Rynex, as defendants, and a decree having been rendered against them in conformity with the plaintiff's bill, they are the appellants here.

The plaintiff charges that he executed a deed to Lemon, and placed it in the hands of Grill to hold as an escrow, until Lemon should pay a certain note given for the purchase money, which note was also left in the possession of Grill; that Grill, for the purpose of defrauding and cheating the plaintiff, either delivered the deed to Lemon or caused the same to be recorded, before any part of the note was paid; that a judgment was afterward rendered against Lemon, and the lands conveyed to him by the plaintiff's deed were levied upon and sold by the sheriff, under the execution on the judgment, and that the defendant, Adele Rynex, became the purchaser; that the sheriff made to her a deed for said lands, and that she held the same in trust for Grill.

The defendants, William H. and Adele, filed an answer to the petition, denying the charges of fraud on the part of the defendants, and denying that the said Adele held the title to the land in trust for the use of Grill, and averred that she purchased the same in good faith on her account and paid full value therefor.

The defendants now object that on the trial the court framed and submitted issues to a jury, when it should have tried the case itself without the aid of a jury. The objection was not made in the court below, and it was a matter resting in the discretion of the court whether it would take the opinion of a jury upon specific questions of fact or not.

In chancery cases, where the court has to find the issues and render its decrees upon the facts, it is better for the court to try the whole case than to attempt to avoid responsibility by appealing to a jury. But the submitting of issues is authorized by statute in a proper case, and the court may pursue that course if it sees fit. The exercise of the discretion is not a ground for error unless we can plainly see that the party has been injured by it. But the court is not bound by the finding as it would be by a verdict at law; it may adopt it or not, and as we review the whole case on the evidence, we will not reverse the judgment if the facts support it, though errors may have been committed on the trial.

The only reason urged for the reversal of the judgment is the admission of illegal and improper testimony. It appears that Burt gave the deed to McClanahan to deliver to Grill, and on the trial, and whilst he was giving evidence, the attorney asked him what instructions he gave McClanahan about the deed. This question was objected to, but the court overruled the objection and permitted the question to be asked. The question was obviously improper, and the objection should have been sustained. Any private instructions that Burt gave his agent as to what he should tell Grill to do, could not be used to operate against the defendants, especially when it is not shown that they had any knowledge of it. But the answer of the witness, although improper, was unimportant, for he testified in the same connection to the fact that he was present when the deed was put in Grill's

hands, and that he delivered the note to Grill himself and instructed him as to the disposition to be made of the papers.

McClanahan also testified that he delivered the instructions to Grill as directed by Burt. This was also objected to, but the objection was overruled. The objection is general for illegality and incompetency, but the specific reasons are not given. For one reason the evidence was admissible, and that was to fasten knowledge on Grill, which is of importance when connected with the other facts of the case. The testimony of Brown, that Grill offered to let him have the land, and stated that he had got it of Burt, we think should have been excluded. It was the simple declaration of the witness as to his ownership and title, and could not be made to affect the interest of the defendants.

The declaration of Lemon, that he did not pay anything on the Burt land, was for the same reason inadmissible, and should have been ruled out. The facts in the case seem to be these: Burt owned 120 acres of land, and sold it to Lemon for $1,200. Lemon executed his note to Burt for that amount. Burt was going away, and he placed this note in Grill's hands as his agent, and also delivered to him a deed to hold as an escrow, with directions to give the deed to Lemon when the note was paid. Burt indorsed his name on the back of the note and ordered Grill to collect it, and with part of the proceeds pay off certain debts of his. The deed to Lemon was placed on record, how or by whom is not shown. The note was never paid, but Grill delivered it to one Rooker, to whom the evidence shows that Burt owed a small amount; and Rooker brought suit against Lemon, obtained judgment, had the land levied on and sold, and at the sale Grill purchased it for his sister, Mrs. Rynex, defendant herein, for the sum of $300. Grill was the agent of both parties, plaintiff and defendants, and unmistakably acted in bad faith toward Burt, the plaintiff. He had full knowledge of all the facts, for he was the principal actor; and under the circumstances, his knowledge ought to be held to affect the defendants. I think, from all the facts, the relationship and connection of the parties, that it is an irresistible inference that the charges in the plaintiff's petition are true.

Notwithstanding the errors of the court in admitting improper testimony, I should be in favor of affirming the decree, were not a material question left out and unnoticed. Mrs. Rynex, when she bought the land, paid the purchase money, $300. That amount is credited on the execution. Burt owed some debts, and with the proceeds of the note he ordered them paid off.

It does not appear what disposition was made of the purchase money at the sheriff's sale; but if it was applied in satisfaction of Burt's debts, he ought not to have the land and the money too. He should refund to Mrs. Rynex before he gets full equitable relief. If he asks equity he should do equity.

For this reason the judgment will be reversed and the cause remanded for further proceedings. The other judges concur.

P. C. PIXLEE *et al.*, Appellants, *v.* OSBORN AND WALKER, Respondents.

1. *Practice, civil — Supreme Court — Chancery — Instructions.* — In purely chancery proceedings, instructions given or refused below are disregarded by the Supreme Court.
2. *Lands and land titles — Vendor — Levy on interest of vendee for purchase money — Effect as to vendor.* — Where a vendor, under a judgment rendered in his favor for the purchase money of land, levies upon the interest of the vendee and purchases the same at the execution sale, he will stand just where he stood before; the vendee will be entitled to redeem and to have a conveyance upon the payment of the purchase money.

Appeal from Clay Circuit Court.

Hardwick, for appellants.

I. Pixlee having purchased Osborn's interest, had the same right of action. (26 Mo. 364.)

II. After the purchase by Pixlee, Osborn had no interest in the land subject to execution. (10 Mo. 398.)

III. The sale and purchase by Walker, relied on in the answer, was void because the vendor's lien cannot be enforced by a suit

in personam. Walker's suit should have been an action *in rem*, and Pixlee made the party defendant. That not being done, his proceedings left him where he commenced. (26 Mo. 364; 10 Mo. 398.)

Vories & Vories, and *McCarty*, *Roult*, and *D. C. Allen*, for respondents.

I. The sale of the 120 acres of land mentioned in the petition was an entirety, and made at one time, as alleged in Walker's answer, and was all included in the title bond, and is all subject to the unpaid part of the purchase money, represented by the two notes, which were rendered into judgments.

II. William Pixley, deceased, only acquired the interest of Henry H. Osborn in the land by purchase, October 8, 1860, at marshal's sale, which interest was simply Osborn's equity of redemption in the lands, the lands being subject to the unpaid part of the purchase money.

III. The purchase money for the lands represented by the notes remains unpaid, and neither plaintiffs nor Osborn have made Walker a tender of the same, nor have they deposited it in court.

The legal consequences flowing from the foregoing acts are: (*a*) That plaintiffs have chosen the wrong remedy. They should have brought a bill to redeem, and tendered to Walker the unpaid purchase money. (*b*) That though the court below became possessed of the facts in the cause, through the pleadings and testimony, yet it was unable to render any judgment in favor of plaintiffs, in consequence of their failure to offer to perform Osborn's contract and pay the unpaid purchase money. (*c*) That plaintiff's petition had no equity in it, and the judgment of the Circuit Court in dismissing it was correct. (*d*) That the judgments of the Circuit Court being the right judgments upon all the facts, they should not be reversed for any errors in the course of the proceeding. (See Lumley v. Robinson, 26 Mo. 364; Parke v. Leewright, 20 Mo. 85; Delassus v. Poston, 19 Mo. 425; Newman v. Lawless, 6 Mo. 279.)

WAGNER, Judge, delivered the opinion of the court.

This was a petition asking for a decree of title to certain lands in Clay county. The plaintiff states, in substance, that one Osborn died seized and possessed of the land in controversy, and that after his death it was sold by proceedings in partition, and that Walker, one of the defendants, became the purchaser thereof; that the other defendant, Henry H. Osborn, was one of the distributees and entitled to a share of the proceeds arising from the sale on partition; that one Sheets was guardian of Henry H. when the sale took place, he being at the time a minor; that Walker contracted with Henry H. to let him have seventy acres of the land for the amount that was due him as his share on the partition sale; that the contract was made while he was an infant, but ratified when he became of age; that he took possession of the premises under this contract and made valuable improvements thereon; that the consideration was fully paid, and the said Henry H. was entitled to a deed therefor conveying the title in fee.

The petition further alleges that afterward or about that time, Henry H. contracted with Walker for the remaining fifty acres, there being 120 acres in all, for which Walker gave him a title bond which would have entitled him to a deed had the purchase money been paid; that while Henry H. was holding the said land, one Nowlin obtained a judgment against him in April, 1860; that execution was issued thereon, and the plaintiff became the purchaser of the same in October, 1860.

The defendants appeared and filed separate answers to the petition. Henry H. Osborn admitted the statements of the petition and consented that judgment should go against him. Walker denied the allegations of the petition, and stated that when Osborn arrived at the age of twenty-one, which was in 1858, he (Walker) sold all the lands mentioned in the petition (120 acres) to him for the sum of $1,538.78, of which $729.18 was paid in cash; that Osborn gave his two notes for the remainder of the purchase money, stating therein what the consideration was; that at the time of receiving the notes he gave Osborn a title bond for

all of the land, 120 acres, wherein he bound himself to convey the land whenever the notes should be paid. He further states that he brought suit against Osborn on said notes in 1860, and recovered judgment, and that under executions issued on said judgment he purchased the land in controversy.

Upon a hearing of the case the court rendered a decree dismissing the petition, and gave judgment against the plaintiff for costs.

As this is purely a chancery proceeding, we pay no attention to instructions given or refused by the court. The only material witness introduced by the plaintiff was the defendant Osborn, who mainly supported the averments in the petition. He stated that the seventy acres of land was fully paid for, and that he was entitled to a deed to the same; that afterward he made a contract with Walker for the fifty acres, and gave his notes for the purchase money and received a title bond; that Colhoun wrote the title bond, and he did not think that both pieces of land were inserted in it. The bond was burned up and could not be produced. He had possession of the land till after Pixlee's purchase, when he put the latter in possession.

For the defendant, Alex. J. Colhoun was introduced and testified that he was circuit clerk; that in the year 1857 or 1858 James Walker and Henry H. Osborn came into his office and asked him to write a title bond. They stated that Walker had sold to Osborn a lot of land; he thinks they said the old Osborn farm; he wrote the title bond, which Walker signed, and the two notes, which Osborn signed. He thinks both of the tracts of land were described in the title bond.

The defendant Walker then being sworn, stated that he sold the two pieces of land described in the plaintiff's petition to Henry H. Osborn, at the time mentioned by Mr. Colhoun in his testimony. It was in the year 1858; Colhoun wrote the title bond. A part of the purchase money was paid by the distributive share of Henry H. Osborn in his father's estate, and was paid by Sheets just after the title bond was made; the balance was secured by the two notes, on which judgments were obtained. Both pieces of land were sold at the same sale. He refused to sell

the first piece of land to Osborn at the time he got possession of it, because he was not of age then, and could not make a binding contract. When he sold the land to Osborn he sold all to him; the whole was one single transaction. What was paid was paid as part purchase money on all, and the notes given were given as balance of purchase of all the land. The balance of the purchase money has never been paid.

It will be seen that there is a conflict in the evidence, and the material question is one of fact. The judgment and sale under which Pixlee purchased were prior in point of time to Walker's judgment and purchase; and if the seventy-acre lot was purchased first and entirely paid for, as contended by the plaintiff, then plaintiff's right to relief is unquestioned. But if the sale of both pieces of land was one entire transaction and the balance of the purchase money is due on both, a very different case is presented.

Where a vendor, under a judgment rendered in his favor for the purchase money of land, levies upon the interest of the vendee and purchases the same at the execution sale, he will stand just where he stood before; the vendee will be entitled to redeem and to have a conveyance upon the payment of the purchase money. (Delassus v. Poston, 19 Mo. 425; Lumley v. Robinson, 26 Mo. 364.)

Pixlee at the sale bought whatever interest Osborn had, and if Osborn could only obtain a title by paying the balance of the purchase money, then Pixlee is in no better situation.

The writings which passed between the parties, and which would furnish the best and most certain evidence of the contract and what passed, have unfortunately been destroyed. The two witnesses, Walker and Osborn, who were the contracting parties, flatly contradict each other. The evidence of Colhoun, then, seems to give a preponderating force to the side of the defendant. In a case like this, where the testimony is so nearly balanced, and where we cannot see the witnesses and have any personal knowledge of their credibility, we are bound to defer to a certain extent to the judgment of the court below, and presume that it decided

correctly. As the case is made out, the defendant mistook his remedy. He should have tendered the unpaid purchase money and then demanded a deed.

Judgment affirmed. The other judges concur.

JAMES D. GARNER, Plaintiff in Error, *v.* GEORGE H. MCCULLOUGH, Defendant in Error.

1. *Practice, civil — Petition — Failure of to state facts sufficient to constitute a cause of action — In such case all testimony may be objected to.* — An objection to a petition that it does not state facts sufficient to constitute a cause of action, may be taken by objection to the admission of any testimony whatsoever.
2. *Practice, civil — Petition, averments in, what sufficient.* — In a suit to recover damages for an invasion of plaintiff's possession or right of possession, the petition failing to aver that plaintiff was ever in possession, or that defendant's acts were wrongful, is bad. In such a petition the averment that plaintiff was "entitled to the exclusive possession" of the premises is an assumption of law, and is also bad.

Error to Clinton Circuit Court.

H. M. & A. H. Vories, for plaintiff in error.

The petition states a cause of action. (Ramsours v. Campbell, 19 Mo. 358.)

J. M. Riley, for defendant in error.

I. The petition does not state facts sufficient to constitute a cause of action.

(*a*) Plaintiff does not state in his petition the terms and substance of his contract by which he claims, or upon which he relied. (Bowling v. McFarland, 38 Mo. 465.)

(*b*) The petition fails to show what remedy is sought, or upon what ground the suit is based. (Bankston, Adm'r, v. Farris, 26 Mo. 175; Biddle v. Boyce, 13 Mo. 532.)

CURRIER, Judge, delivered the opinion of the court.

The defendant answered the petition, and put in issue the facts therein alleged. At the trial the plaintiff's evidence was objected

to and excluded upon the ground that the proof of all the facts alleged would not warrant a recovery. In other words, the objection was taken in the form of an objection to the evidence, that the petition did not state facts sufficient to constitute a cause of action. It is averred in the petition that the plaintiff, in virtue of a contract with one Evans, was entitled to the exclusive possession of certain premises; that the premises, subsequently to the making of the Evans contract, were purchased by the defendant, with a knowledge of the plaintiff's rights; and further, that the defendant forcibly took possession of them and excluded the plaintiff. Who Evans was, or what his relations to the premises might have been, the petition fails to show: as it also fails to show the nature of the supposed contract. The suit seems to have been brought to recover damages for an invasion of the plaintiff's possession or right of possession; but it is not averred that the plaintiff was ever in possession, or that the defendant's acts were wrongful. The Evans contract is not set out either in substance or legal effect. The averment that the plaintiff was "entitled to the exclusive possession" of the premises is the statement of a mere conclusion of law, from facts which were traversable, and which are not set out in the petition. (Smith v. Dean, 19 Mo. 63.)

The petition is clearly bad, and the judgment will be affirmed. The other judges concur.

JAMES W. ALNUTT, Plaintiff in Error, *v.* JAMES LEPER *et al.*, Defendants in Error.

1. *Practice, civil — Demurrer — Objections not specified in, will not be noticed on hearing of.*— In passing upon a demurrer, the court will not take notice of defects not therein specified, especially when the pleading can probably be amended so as to make a case or avoid the defect.
2. *Equity — Judgment lien not essential to plaintiff's equity.*— Plaintiff in a judgment at law may procure the aid of a court of equity in order to charge the property of defendant, without first securing a judgment lien against it. Although such lien is usually an incident, it is not essential to his equity. (Glenny v. Freeman, 44 Mo. 518, affirmed.)

3. *Practice, civil — Pleadings — Demurrer — Improper joinder of parties, who may demur.*—Where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined can alone demur. If other parties join in the demurrer, it should be overruled as to them.

4. *Equity can be resorted to only after legal remedies have been exhausted.*—Ordinary legal remedies must be shown to have been exhausted to entitle one to his remedy in equity.

Error to Grundy Circuit Court.

Samuel and *Broaddus*, for plaintiff in error.

I. The petition is sufficient. The facts and allegations necessary to constitute a cause of action are sufficiently alleged.

II. When a fraudulent conveyance is made, as in the present case by Craig, the creditors or any one of them may file a bill in equity to have the same set aside. (George v. Williamson, 26 Mo. 190; Brown's Adm'r v. Quinley, 18 Mo. 375.)

III. Norman J. Bliss, as administrator of the estate of Andrew Craig, deceased, is a necessary party to the suit. (1 Am. Lead. Cas. 74, and authorities cited.)

IV. Plaintiff is not attempting to enforce the lien of a judgment, but is merely attempting to subject the property to the payment of his debt. The death of Craig after the expiration of plaintiff's judgment lien does not preclude him from asserting his equitable right as a creditor to set aside the conveyances made and accepted for the purpose of defrauding Craig's creditors, and from proceeding against the fraudulent grantee, Leper, and to subject the property found in his possession to the payment of the debts of said Craig. The death of Craig did not make the fraudulent conveyances valid as against his creditors.

McFerran & Collier, for defendants in error.

I. Norman J. Bliss, as administrator of Andrew Craig, has no interest in the controversy, and is not a necessary party to a complete determination of the action.

II. The petition does not state facts sufficient to constitute a cause of action, in this: the petition does not show or allege any title, claim or lien in the plaintiff to the land to be affected by the decree sought, nor any right whatever to the land or any

part thereof, or to set aside the conveyances of the same. (Hiney v. Thomas, 36 Mo. 377; Martin v. Michael, 23 Mo. 50; Brinkerhoof v. Brown, 4 Johns. Ch. 671; Melville v. Brown. 1 Har. Johns. 367.)

III. The petition does not even show that execution was ever issued. (2 Sto. Eq. Jur. 438 and note.)

Bliss, Judge, delivered the opinion of the court.

The petition charges that the plaintiff, in 1860, recovered a judgment against James Craig, deceased, for some $20,000; that without consideration, and to defraud plaintiff, the said Craig in his lifetime conveyed his real estate to certain of the defendants; that in 1867 he died, and one of the defendants, Norman J. Bliss, is his administrator; and prays that the property may be sold and the proceeds applied to the payment of the plaintiff's said judgment. The defendants jointly demur to the petition and specify the grounds of demurrer, to-wit: 1st, because the petition does not allege facts showing a lien or title in the plaintiff to the real estate covered by the conveyance; 2d, Craig having died before execution and after the expiration of the judgment lien, the plaintiff has no equity; 3d, the administrator of Craig is not a proper party. The demurrer was sustained by the Circuit Court, and judgment was entered upon it. I have given the grounds of the demurrer because, although the petition seems to be defective, it is not so, for the reasons named, and the court committed error in sustaining the demurrer. The statute is imperative that "the demurrer shall distinctly specify the grounds of objection to the pleadings" (Wagn. Stat. 1015; Gen. Stat. 1865, ch. 165, § 7), and, when they are so specified, the court will not take notice of other defects, especially when the pleading can probably be amended so as to make a case or avoid the defect. (Cheely's Adm'r v. Wells, 33 Mo. 106; Loomis v. Tifft, 16 Barb. 541.) The first and second grounds of objection are substantially the same, and the pleader seems to suppose that there must be a specific judgment lien in order to sustain a creditor's bill. Judges have sometimes so remarked, but the subject was considered by us in Glenny v. Freeman, 44 Mo. 518, and it was held that

though such lien is usually an incident, it is not essential to the plaintiff's equity. Upon the third ground of objection it is only necessary to say that if a person is improperly brought into court, and is not a necessary party to the proceedings, he alone can object to it. The other parties have no interest in the question, and if they join in the demurrer it should be overruled as to them. (Ashby v. Winston, 26 Mo. 210; State Bank v. Paris, 35 Mo. 371; Ancell v. Cape Girardeau, *ante*, p. 80.) It does not appear from the petition that the plaintiff has exhausted his remedies at law. It is not shown that he has taken any steps to recover his debt of the administrator, or that he has established it against the estate. He must pursue his ordinary legal remedies before he can ask us to set aside the conveyance of the deceased.

The judgment will be reversed and the cause remanded, that the plaintiff, if he desires, may amend his petition. The other judges concur.

A. C. Wood, Appellant, *v.* O. P. Newberry, Respondent.

1. *Practice, civil — Actions — Suit on judgment before a justice.* — When a debtor in a judgment before a justice has left the county in which the judgment was rendered, the judgment creditor is at liberty to revive his claim by a direct suit upon the judgment itself.

Appeal from Cameron Court of Common Pleas.

McCandless & Henry, for appellant.

Under the statute (R. C. 1855, p. 951, § 6; Gen. Stat. 1865, p. 712, § 6) the appellant could not sue out an execution unless the judgment was first revived, and this could only be done by a citation served on the defendants, which citation could only be served by the constable of the township in which the suit was pending in his county, and not out of it. Defendant moved from the county of DeKalb (where the suit was pending) to Clinton county in 1862, and has not resided in DeKalb county since, except during the year 1865; and as plaintiff could not find the defendant in said county of DeKalb, he has been unable to serve notice on him to revive the judgment. Plaintiff's remedy was

by a direct suit on the transcript of the judgment before the justice, and not by taking the extraordinary step of filing a transcript of the judgment of the justice in the office of the circuit clerk of the county where the judgment was rendered. (Counsel here cited and commented on Bauer v. Bauer, 40 Mo. 61, and Carpenter v. King *et al.*, 42 Mo. 219.)

Robert Caldwell, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This suit was founded upon a judgment of a justice of the peace. The judgment was rendered in DeKalb county, March 9, 1861. The present suit upon that judgment was commenced July 29, 1871, in Clinton county, where the defendant had resided for a number of years. It is not claimed that the judgment is barred by the statute of limitations, or that it is in any respect defective or informal. The only point urged against a recovery upon it in this action is that the plaintiff has mistaken his remedy; that instead of suing upon it, he ought to have taken measures under the statute to revive it. There is no force in the objection. The judgment was dormant. The judgment debtor had left the county where it was rendered, and the judgment creditor was at liberty to revive his claim by a direct suit upon the judgment itself.

The judgment of the court below will be reversed and the cause remanded. The other judges concur.

WILLIAM BARBEE, JR., Respondent, *v.* WILLIAM HEREFORD, Appellant.

1. *Practice, civil — Supreme Court — Marginal marks no part of a record.*— Marks in the margin of a record, such as the words "given" or "refused," placed beside an instruction in the margin of a transcript, form no part of the record.
2. *Slander — Words imputing immoral or indictable offense actionable in themselves.*— Words imputing the commission of an immoral and indictable offense are actionable in themselves; and in such case the law will infer malice, and there is no necessity of proving it.

Appeal from Livingston Circuit Court.

Collier, *Broaddus* and *Pollard*, for appellant.

The words charged are not actionable *per se;* hence, malice should have been proved by respondent. (2 Greenl. Ev. 394, § 418.)

McFerran and *Mansur*, for respondent.

The slanderous words charged in the petition, with the averments there made, impart malice *per se*, and express malice need not be proved, for when words are actionable in themselves, malice is always implied. As to malice implied, see Estes v. Antrobus, 1 Mo. 140; Weaver v. Hendrick, 30 Mo. 502. As to damages *per se*, when proper averments are made, see Palmer v. Hunter, 8 Mo. 512; McManus v. Jackson, 28 Mo. 56.

WAGNER, Judge, delivered the opinion of the court.

This was an action of slander, and the petition charges that the appellant falsely and maliciously spoke of and concerning the respondent, and his evidence given in certain judicial proceedings therein referred to, the following words: "Bill Barbee," meaning plaintiff, "swore to a damned lie, and I can prove it," meaning thereby to charge that the respondent had been and was guilty of perjury. The answer is a simple denial. Verdict for plaintiff.

It is objected by appellant's counsel that the court erred in refusing certain instructions asked by them. But this objection is not available. What the action of the court was in reference to instructions we cannot tell. The record merely states, "whereupon the court refused to give instructions numbered ——; to the judgment of the court in refusing said instructions the defendant then and there excepted." There are an almost indefinite number of instructions asked; some are numbered and some are not numbered; some are marked in the margin of the record "given," some "refused," and some have no mark at all. It is utterly impossible for us to know what action the court below took in reference to the instructions, or to what one in the series

the objection applies. The mark in the margin constitutes no part of the record.

We have failed to see any error in the instructions given for the respondent. The petition shows that the speaking of the offensive words had reference to a judicial proceeding. There is an allegation that the court had full jurisdiction, and was competent to administer the oath, and that the respondent was sworn and gave testimony. The words uttered impute the commission of an immoral and indictable offense, and are therefore actionable in themselves. (McManus v. Jackson, 28 Mo. 56; Pennington v. Meek, 46 Mo. 217.) Under such a state of facts the law infers malice, and there was no necessity of proving it, as contended for by the appellants. (Pennington v. Meek, *supra*; Buckley v. Knapp, *ante*, p. 152.) The record does not disclose any error which would justify this court in interfering.

Affirmed. The other judges concur.

W. T. RUTHERFORD, Appellant, *v.* B. N. TRACY *et al.*, Respondents.

1. *Estoppel in pais — Pointing out of wrong lines by grantor — Sale of property, erection of building, etc.* — Where the grantor of certain real estate showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected and money expended, he thereby directly led the purchaser into a line of conduct prejudicial to his interest, and should not afterward be heard alleging anything to the contrary. Such acts would constitute an estoppel *in pais*.
2. *Conveyances — Description by lot should prevail over that by courses and distances.* — Where the granting clause of a deed designated the property conveyed as "lot number 3 in block 87," of a certain town, and afterward described it by metes and bounds which embraced an area less than the lot, the legal inference or presumption was that the grantor conveyed the whole lot, and attempted to give it a more particular description by bounding it with courses and distances. The designation of the number of the lot had the same effect as that of a fixed monument, and prevailed over an inconsistent description by courses and distances, there being nothing to show that the grantor designed to reserve or carve out any part of the lot. Had the grantor in his deed used any apt or appropriate words showing that it was not his intention to convey the whole lot, effect should be given to them and that, without regard to any mere verbal position they might occupy in the deed.

Appeal from Macon Circuit Court.

W. A. Hall, for appellant.

The deed from plaintiff to said Demeter's grantor did not convey the whole of lot 3. In giving construction to the deed, the whole must be taken together to ascertain its meaning. (Campbell *et al.* v. Johnson, 44 Mo. 248.)

Plaintiff was not estopped by his acts from claiming his lot, because defendant was better informed of its location than the plaintiff, and had all the means in his favor of ascertaining its true location. The doctrine of estoppel is always applied with great caution, and especially where used to enlarge a grant by deed. (3 Hill. 221; 8 Wend. 484.)

Henry and *Williams*, for respondents.

I. Appellant's deed to Amos Ladd conveyed all of lot No. 3 in block 87. The succeeding description by metes and bounds is repugnant to the description of the land by its number on the plats, and will be rejected. (Cutter v. Tufts, 3 Pick. 272; Sprague v. Snow, 4 Pick. 54; Melvin v. Proprietors of Locks, etc., 5 Metc. 15, overruling Barnard v. Martin, 5 N. H. 536; see also Greenl. Cr., tit. Deed, 32, ch. 20, § 8; Tyler on Eject. 569–70, and cases cited.)

II. The declarations of Hayden L. Rutherford, while he was the owner and in possession of the lot in controversy, were admissible as evidence against the appellant, who claimed under him. (Tyler on Eject., *supra*; Cavin v. Smith, 24 Mo. 221; Wood v. Hick, 36 Mo. 326.)

WAGNER, Judge, delivered the opinion of the court.

The whole merits of this case depend upon two questions: first, what is the true meaning and intent of the granting clause in the deed conveying the property in controversy; and, second, whether an estoppel could be predicated upon the facts disclosed by the evidence. The action was ejectment for a part of lot 3 in block 87, in the town of Macon; and the defendants, who are in posses-

sion, claimed the entire lot by conveyance. The language conveying the premises is as follows: "Lot No. 3 in block 87, in the old town of Hudson, now Macon; beginning at the northeast corner, thence west to the alley, thence south eighteen feet, thence east the length of the lot, thence north eighteen feet to the beginning." *

The defendants now contend, and the court so instructed, that this description passed the fee to the whole lot. The old books contain a great deal of refined and technical learning on this subject. They say that if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received and the latter rejected, unless there be some special reason to the contrary; but in the case of a will containing two repugnant clauses or parts, the first shall be rejected and the last received. That the first deed and the last will shall operate, is an ancient maxim. (Plowd. 541; Co. Lit. 112; Shep. Touch. 88.) Upon the rules as laid down in the old authorities, Judge Metcalf, in 23 American Jurist, makes some very sensible remarks. "In modern times," he says, "this maxim has very limited operation. A reason to the contrary is almost always found. The rules of construction now applied in cases of repugnancy give effect to the whole and every part of a will, deed, or other contract, when that is consistent with the rules of law and the intention of the party; and when this is impossible, the part which is repugnant to the general intention, or to an obvious particular intention, is wholly rejected. Parts which were once regarded as repugnant are now deemed consistent."

Greenleaf, in his edition of Cruise on Real Property, lays down the doctrine that the modern rule is to give effect to the whole and every part of the instrument, whether it be a will or deed, or other contract; to ascertain the general intention, and permit it, if agreeable to law, whether expressed first or last, to overrule the particular; and to transpose the words, whenever it is necessary, in order to carry the general intention plainly manifested into effect. (2 Greenl. Cr., tit. Deed, ch. 12, § 26,

* This description actually embraced a less area than lot 3

note 1, and cases cited.) Mr. Washburn declares that when the parts of a deed are found inconsistent with each other, the courts always give effect to every part of the deed if it is possible, consistently with the rules of law. (3 Washb. Real Prop. 343.) To the same purpose is the recent decision in this court in the case of Campbell *et al.* v. Johnson, 44 Mo. 247. If there is an explicit and unambiguous grant of a thing, any exception or reservation which is manifestly contradictory will be rejected; but the intention must be sought after and carried out, if consistent with the rules of law. It is, however, well settled that a deed must be construed *ex visceribus*; the nature and quantity of the interest granted are always to be ascertained from the instrument itself, and fixed monuments always control courses and distances. The Supreme Court of the United States say that it is a universal rule that whenever natural or permanent objects are embraced in the calls of a patent or survey, these have absolute control, and both course and distance must yield to their influence. (Brown *et al.* v. Huger, 21 How. 306.)

In Lodge v. Lee, 6 Cranch, 237, the description was, "all that tract or upper island of land called "Eden," and then it was added, "beginning at a maple tree," and describing the land conveyed, by bounds, courses and distances, but so as not to include all the island. The court held that the whole island passed.

In Keith v. Reynolds, 3 Greenl. 393, the description was, "a certain tract of land or farm in Winslow, included in the tract which was granted to Esq. Pattee," and afterward there was added a particular description of courses and distances, which did not include the whole farm. It was contended that the particular description should prevail in preference to the other, which was more general and uncertain; but it was decided that the first description was certain enough, and that it was to be adopted rather than the description by courses and distances, which was more liable to errors and mistakes.

In Jackson v. Barringer, 15 Johns. 471, the grant was, "the farm on which J. J. D. now lives," which was bounded on three sides, and "to contain eighty acres in one piece." The farm

contained 149 acres, and the decision was that the whole farm passed. If a farm or tract of land is conveyed by general terms, an exception of any number of acres or any particular lot is not repugnant, but will be valid. A particular reservation may well consist with a general grant, and it will create no repugnancy. Did any facts exist in this case to show that the description of the lot by courses and distances was intended at the time to restrict or limit the quantity conveyed to a less area than the whole lot, we should unhesitatingly, in accordance with the liberal rules that have prevailed in modern times, give full force and effect to that intention. But there is nothing to manifest such intent. The granting clause in the deed is: "Lot 3 in block 87, beginning at the northeast corner, thence west to the alley, thence south eighteen feet, thence east the length of the lot, thence north eighteen feet to the beginning." The legal inference or presumption is that the grantor conveyed the whole lot, and attempted to give it a more particular description by bounding it with courses and distances. The designation of the lot by its number must be regarded as the prominent object or monument; and where there is uncertainty, the monument must prevail over the description by courses and distances. There is nothing to show any reservation whatever, or that it was intended in the conveyance to carve out any piece or parcel of the lot. If A. sells to B. the farm on which he resides, and then goes on to describe the farm by courses and distances, and there is a mistake or erroneous description, the whole farm will nevertheless pass; because, in the case supposed, it was the manifest intention, gathered from the deed itself, to convey the whole farm. Had the grantor (the plaintiff in this case) in his deed used any apt or appropriate words showing that it was not his intention to convey the whole lot, we should give them effect without regard to any mere verbal arrangement or position they might occupy in the deed. But as it is, without overthrowing well-established principles of law, we are not at liberty to construe the deed otherwise than as passing title to the whole lot.

This conclusion is decisive of the whole case, and renders it unnecessary to examine the other point in reference to the law of

estoppel. If the grantor showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent whilst a house was being erected and money expended, he directly led the purchaser into a line of conduct prejudicial to his interest, and should not now be heard in alleging anything to the contrary. Such acts would constitute an estoppel *in pais*. The facts, however, were for the jury, and we have seen no error in the court's instructions on that question.

Judgment affirmed. The other judges concur.

ANDREW J. BROWN Appellant, *v.* ROBERT K. WOODS *et al.*, Respondents.

1. *Practice, civil — Pleadings — Demurrer on ground of misjoinder of parties overruled as to those properly joined.* — Demurrer to the petition on the ground of improper joinder of parties defendant should be overruled as to the party or parties against whom a good cause of action has been stated.

Appeal from Linn Circuit Court.

Easley, for appellant.

The petition stated a good cause of action against Woods and Stephens, and even if Pratt was improperly joined, or if no cause of action was stated against him, the demurrer could only have been sustained as to him; and the court should not have given judgment on such demurrer in favor of Stephens and Woods. (Ashby v. Winston, 26 Mo. 210, and cases cited; Lyon v. Page, 21 Mo. 104.)

G. D. Burgess, for respondents.

The defendants had the right to join in the demurrer because of a misjoinder of parties defendant. (Farmers' Bank of Mo. v. Bayless, 41 Mo. 285; Wagn. Stat. 1014, § 6.)

In the case of Ashby v. Winston, 26 Mo. 210, the defendants who were improperly made parties did not join in the demurrer. Winston alone demurred, and the court held that he could not

take advantage of the fact that other parties were improperly joined as defendants. In this case the defendants all join in the demurrer.

While it is conceded that the better practice is for those alone to demur who are improperly made parties, it is insisted that all the parties, either plaintiffs or defendants, may join in the demurrer when the cause assigned is a misjoinder of parties.

CURRIER, Judge, delivered the opinion of the court.

A good cause of action is admitted to be stated against one of the three defendants, but all joined in a demurrer to the petition; the cause of demurrer relied upon being the misjoinder of the parties defendant. The demurrer was sustained as to all, and final judgment was rendered in their favor accordingly. The demurrer should have been overruled as to the party or parties against whom a good cause of action was stated, and who were consequently properly joined in the suit. This is the settled practice in this State. (Ashby v. Winston, 26 Mo. 210; Bank of the State of Missouri v. Parris, 35 Mo. 371.)

The judgment will be reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.*, ETC., Respondent, *v.* CHARLES MOELLER *et al.*, Appellants.

1. *County Court, clerk of—Swamp lands—Stray act—Construction of statute.* —Notwithstanding the provisions of section 81, ch. 46, Gen. Stat. 1865, and Wagn. Stat. 1259, § 79, it is not the duty of the clerk of a County Court to collect the proceeds arising from the sale of swamp lands, or of "section 16," or moneys received under the stray act, and the sureties on his official bond cannot be held for the amount of moneys so collected by him, and not paid over as required by law.

A proper interpretation of section 81 does not authorize the county clerk to receive the money, but imposes upon him, as the keeper of the public accounts and the custodian of the evidences of indebtedness, to see that collections are enforced.

The State of Missouri ex rel., etc., v. Moeller et al.

Appeal from Carroll Circuit Court

Hall & Oliver, for appellants.

The words "all other moneys for school purposes," in section 81 of the school law, cannot mean moneys arising from the sale of school lands. When the Legislature authorized the county clerks to collect fines and penalties, which amount at most to a few hundred dollars annually, it did not mean, by the addition of the words "other school moneys," to authorize the clerks to collect the whole school fund, which in many counties amounts to tens of thousands of dollars. (1 Blackst. Com. 87, § 2.)

The words "fines, penalties, and all other moneys," mean fines, penalties, and all other moneys of a like character. (Broom's Legal Max. 374 *et seq.*)

The construction contended for by plaintiff is in direct conflict with other statutes of the State. (2 Wagn. Stat. 1300, §§ 22, 23; *id.* 862, § 22; Gen. Stat. 1865, pp. 269–71, §§ 64–74.)

Ray & Ray, for respondent.

While it was made the duty of the county treasurer to receive all moneys belonging to the school fund, it was nowhere made his duty to become a collector of such funds. As a matter of fact, the clerks of the County Courts have the custody of the bonds and notes and mortgages for the school funds, arising from whatever source. County Courts have the care and management, by law, of the school funds, and under Gen. Stat. 1865, ch. 46, § 81, the county clerk is made the agent and executive officers of the court in the discharge of this duty. (Gen. Stat. 1865, ch. 46, p. 270, § 65; *id.* ch. 49, p. 283, § 6; *id.* ch. 48, p. 279, § 6; *id.* ch. 48, p. 280, §§ 16–18.) If the county treasurer is by law the custodian of these bonds and notes, and, of necessity, charged with the amount thereof, why is he again charged with any amount of money that may be paid in to him on these same bonds (under Gen. Stat. 1865, ch. 46, p. 271, §§ 74–5) by the clerk of the County Court? and why is the clerk directed to credit the amount so paid in on the bonds and

notes and mortgages, if the bonds and mortgages are not in his possession? All the policy of the law, in all its provisions, looks to the active agency of the county clerk in making the collection of these funds. (Gen. Stat. 1865, p. 231, § 41; *id.* 389, § 23; *id.* 269, § 49; *id.* 265, §§ 31–33.)

If these payments are unauthorized the debt remains unpaid, and the parties are liable to a second payment. If the law makes it his official duty to make these collections, the county clerk cannot escape responsibility by assuming to make the collections in the name or as the agent of another party.

BLISS, Judge, delivered the opinion of the court.

Defendant Moeller was charged with collecting, as clerk of the Carroll County Court, certain moneys belonging to the school fund of the county, to-wit: the proceeds of the sale of the swamp lands, of the sale of section 16, and money received under the stray act. This suit is upon his official bond, and his sureties claim in defense that it was no part of the clerk's official duty to collect such moneys, and consequently that they are not holden on the bond for their reimbursement.

Counsel for relator base the liability of defendant upon Gen. Stat. 1865, ch. 46, § 81; Wagn. Stat. 1259, § 79, which provides that "the said county clerk shall collect or cause to be collected the fines and penalties, and all other moneys for school purposes in his county, and pay the same over to the county treasurer on account of the school fund," etc.

If this provision is construed to authorize the payment to the clerk of moneys arising from the swamp land and section 16 school fund, and from the sale of strays, it contradicts other provisions of the statute. Sections 22 and 23 of the stray act (Gen. Stat. 1865, ch. 83; Wagn. Stat. 1300) provide for payments "into the county treasury for the use of the school fund of such county." Chapter 49 of the General Statutes provides for the sale or lease of section 16 for the use of the school fund, and section 22 (Wagn. Stat. 862) expressly requires that rents be paid into the county treasury, and that the treasurer shall give duplicate receipts therefor; so, when the

township school fund is loaned, being the proceeds of section 16, the principal and interest when collected are payable into the county treasury, and the treasurer is required to give duplicate receipts, etc. (Wagn. Stat. 1257, § 72.) The act relating to county treasuries (Wagn. Stat. 410, § 7) provides that the treasurer shall receive all moneys payable into the treasury, and the school act (Wagn. Stat. 1249, § 26) specially provides that he shall be the treasurer of all school moneys; and even in regard to fines and penalties, specially named in the section upon which the relator relies, so far as they are collected by "collectors, sheriffs, marshals, clerks, constables," etc., these officers are chargeable therewith, and they must "pay any balance due the county into the county treasury, taking duplicate receipts therefor, and deposit one with the clerk of the County Court," etc. (Gen. Stat. 1865, ch. 38, § 19; Wagn. Stat. 412); and to enforce such payment, sections 40, 41, 42 and 43 of the same act make stringent provisions.

The provisions of our school act in regard to collections seem to be made somewhat contradictory by the clause quoted, authorizing county clerks to collect, which was thrown into the revision of 1865. No other provision was expressly repealed, and, upon well-settled principles, we cannot hold them repealed by implication if any other construction can be reasonably given. Here, then, we have a general clause directing the clerk to collect, or cause to be collected, fines, penalties, and all other moneys; while the statute had specifically provided for the collection of each specific fund in a different manner. There is nothing else in the statute that authorizes the clerk to collect anything but his own fees, and there are greater difficulties in giving this provision the construction indicated by a literal interpretation of its terms, than even by holding it nugatory. The phrase is "all other moneys," and by such interpretation it would include those collected by the county collector upon the tax books, and everything that belongs to the school fund. It will not be seriously claimed that this clause makes the clerk the general collector for the county of school moneys, and yet its literal interpretation would have that effect. If not the general

collector, where are his collections to stop? The amounts collected upon the assessments spread upon the tax books are as much "other moneys" as the sums paid upon loans of the township or county school funds. For all these "other moneys" a different mode of collection is provided, and of some of them it would be impossible, under our collection laws, for the clerk to be the collector. We ought, then, to find an interpretation that will reconcile all the statutory provisions, and that is consistent with their general spirit.

We are then forced to the conclusion that the section quoted is not authority to receive money, but that it imposes the general duty upon the clerk, as the keeper of the public accounts and the custodian of the evidences of indebtedness, to see that collections are enforced. He alone is supposed to know when payments become due, and he should look sharply after every description of indebtedness, bring the matter before the proper authorities or tribunals, and see to it that the school funds do not suffer from inattention or delay. But we cannot make him a county treasurer or collector proper, without nullifying other provisions of the statute and throwing into confusion our whole system of county finances.

The Circuit Court held that the clerk was authorized to make these collections, that they came within his official duties, and hence that the sureties upon his official bond are bound to make good any default on his part in accounting for them. Under the view we hold, its judgment must be reversed. The other judges concur

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E. B. BOWMAN *et al.*, Respondents, *v.* JOSIAH LEE, Appellant.

1. *Ejectment — Possession, adverse, what sufficient.* — Possession, to be adverse and bar the original owner, must be actual, open and notorious, under claim of ownership, and continuous and uninterrupted, either in the party holding or his grantor.
2. *Conveyances — Record — Notice.* — One who has a conveyance from the actual owner of land, directly or through others, is protected under the registry act, although there may have been a previous conveyance, provided such prior deed be unrecorded and he has no actual knowledge of its existence.

Appeal from Davies County Common Pleas.

James McFerran, for appellant.

Vories & Vories, and *D. Metcalfe*, for respondents.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs bring ejectment, and rely upon a United States patent to their ancestor. Defendant relies upon the statute of limitations, and claims to be an innocent purchaser without notice. The case was submitted to a jury upon elaborate instructions, who gave a verdict for the plaintiff, upon which judgment was rendered.

This is one of the numerous cases that are improperly brought into this court. The record is a long one, and shows no error. Appellant complains of the instructions, but they give the law in relation to adverse possession carefully and correctly. They show that possession, to be adverse and bar the original owner, must be actual, open and notorious, under claim of ownership, and continuous and uninterrupted, either in defendant or his grantors. Defendant purchased in 1867; showed no actual possession in his grantors, but only some acts of ownership, and sought to substitute such acts of ownership for the actual possession required in order to overcome the constructive possession that follows the title.

Defendant's grantor purchased at sheriff's sale upon execution against one who had no title or vendible interest; and in some of the instructions which he claims should have been given, he seems to suppose that there is some special virtue in a sheriff's deed, and that a sale by the sheriff can give a better title than that of the execution debtor. The defense also, that the defendant was an innocent purchaser, was wholly misconceived. One who has a conveyance from the actual owner, directly or through others, is protected under the registry act, although there may have been a prior conveyance, provided the latter is unrecorded and he has no actual notice of its existence. But it is not pretended that the plaintiff's ancestor, who held the title to the land, or his heirs, ever made any conveyance whatever; and the defendant could not have been deceived unless he purchased blindly.

The other judges concurring, the judgment will be affirmed.

RICHARD MEEK, Respondent, *v.* ROBERT A. HEWITT, Appellant.

1. *Practice, civil — Supreme Court may review judgment of Circuit Court rendered on motion, without motion for new trial.* — The Supreme Court may review the decisions of an inferior court rendered on motion — as on a motion to correct a sheriff's return — although no motion for new trial has been made.

Appeal from DeKalb Circuit Court.

Woodson, *Vineyard*, and *Young*, for appellant.

No motion for a new trial was necessary in this case in order to bring it properly into the Supreme Court, the judgment from which this appeal has been taken being a judgment on a motion to amend sheriff's return after final judgment in the case. (See Baker v. Waugh, 34 Mo. 330; Bruce v. Vogel, 38 Mo. 100; Parker v. Hann. & St. Jo. R.R. Co., 44 Mo. 415.)

Strong & Chandler, for respondent.

There was no motion in the Circuit Court for a new trial or in arrest of judgment, and where this is the case, this court has repeatedly held that it will not review the proceedings of the court below. (36 Mo. 400; 41 Mo. 398; 46 Mo. 389.)

An amendment of process or return is always freely allowed in aid of a judgment, although denied where their effect is to create error. It makes no difference that the sheriff is out of office. (45 Mo. 113; 46 Mo. 314.)

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that on the 21st day of June, 1864, Meek, the respondent, filed his petition in the office of the clerk of the DeKalb Circuit Court, against the appellant Hewitt, asking for a judgment for $100. The clerk issued a summons thereon, which was placed in the hands of the sheriff, and on the same day the sheriff indorsed on the writ the following return: "I certify that I have served the within writ and petition by leaving a copy

of the same with Mrs. Mary Hewitt, the wife of the within named defendant, this 21st day of June, 1864; all done in DeKalb county. J. E. Branscom, sheriff of DeKalb county."

At the following September term of the court, a judgment was rendered in favor of the plaintiff upon that service and return after the lapse of five years, and at the March term of the court, 1870, the sheriff in the meantime having died, the respondent filed a motion to amend and correct the return.

The court proceeded to hear testimony on the motion, and after finding that the sheriff was dead, gave judgment amending the return so as to make it read as follows: "I certify that I have served the within writ and petition by leaving a copy of the same with Mrs. Mary Hewitt, who was and is a white member of the defendant's family, over the age of sixteen years, and the wife of the defendant, at the usual place of abode of the defendant, this 21st day of June, 1864; all done in DeKalb county. J. E. Branscom, sheriff of DeKalb county, Mo."

The evidence is all preserved in a bill of exceptions. It is objected that this court cannot review the action of the Circuit Court because there was no motion filed for a new trial; but in the matter of reviewing decisions rendered in the inferior courts on motions, the ruling here has been otherwise. (Bruce v. Vogel, 38 Mo. 100; Parker v. Hann. & St. Jo. R.R. Co., 44 Mo. 415.) Under no possible circumstances can the evidence be made to support the finding and judgment of the court. All the witnesses, both for the plaintiff and defendant, concur that at the time of the pretended service Hewitt was out of the State, and had no fixed place of abode in DeKalb county.

In 1861 he left this State and went to Baltimore to reside, and did not return till 1868. Previous to his departure he owned property and kept house, but when he left he quit house-keeping, and his wife boarded at several places during his absence. It is not denied that she was boarding in another family when the writ was served upon her. The defendant at that time had neither domicile nor abode within the jurisdiction of the court. The return, therefore, that the court makes out for the dead sheriff, is

not true in point of fact. Whether in any case, upon hearing evidence, the court could make an amendment for the officer, need not be discussed.

Judgment reversed. The other judges concur.

STATE *ex rel.* KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY, Relator, *v.* NODAWAY COUNTY COURT. Respondent.

1. Kansas City, St. Joseph & Council Bluffs Railroad Company v. Aldermen *et al.*, 47 Mo. 349, affirmed.

Petition for Mandamus.

B. K. Davis, for respondent.

Stringfellow, and *Hall & Oliver*, for relator.

WAGNER, Judge, delivered the opinion of the court.

This cause was before this court at the last term (47 Mo. 349), on a motion to strike out certain portions of the defendant's return, as constituting no defense to the relator's demand.

In deciding that motion we distinctly held that the county had the power to subscribe the stock.

An amended return is now filed by the respondents, in which they admit all the facts stated in the petition to be true, and they further say that they do not desire to avoid any legal obligation incurred by the county; but they further state that they are advised that they are not authorized by law to issue the bonds, and they therefore pray the judgment of the court.

As the facts are admitted as stated in the relator's petition, and as we have heretofore decided that the court had authority to make the subscription, nothing remains to be done but to award the writ.

Peremptory writ ordered; the other judges concurring.

FRANKLIN T. GRIMES, Respondent, *v.* GARRARD LONG AND FRANCIS E. LONG, Appellants.

1. *Husband and wife—Marital interest of husband in his wife's property liable for his debts, when.*—The marital interest of the husband in his wife's realty was, before the adoption of the provision contained in section 14, ch. 115, Gen. Stat. 1865 (Wagn. Stat. 935, § 14), liable for his debts not contracted by him prior to his marriage, or as surety, or prior to the time when his wife came into possession of her property. (R. C. 1855, p. 754.)

Appeal from Clay Circuit Court.

This was a suit in ejectment in the Clay Circuit Court by the plaintiff against Garrard Long, defendant. The evidence showed among other things a sheriff's deed to plaintiff, purporting to convey to him the interest of defendant, Garrard Long, in the land in controversy. For other points, see opinion of court.

Vories & Vories, for appellants.

The judgments and execution were against Garrard Long alone, and his property alone was levied on, and his interest sold; but this could not affect his wife's property under 1 R. C. 1855, p. 754, which was the law in force at time of sale.

Jenkins, Hardwick & Merriman, for respondent.

Should the court be of opinion that Francis Long had some title in the property sold, nevertheless it was subject to the executions issued on the judgments. They were debts contracted long before the act of 1866, and under the act of 1855. (R. C. 1855, p. 754.) Under that law the husband's estate during marriage, in his wife's realty, or his tenancy by the curtesy, is subject to sale for his debts. (Schneider v. Stahr, 20 Mo. 269; 1 Sel. Eq. Cas. 489.)

BLISS, Judge, delivered the opinion of the court.

This is an action for possession of real estate, and plaintiff relies upon a sheriff's deed given him, in pursuance of an execution sale in 1863 to satisfy certain judgments against defendant, Garrard Long.

The only defense worthy of consideration was attempted to be made by Mrs. Long, who claimed to own an undivided half of the property in her own right; but the court refused to consider it, and instructed the jury in favor of the plaintiff.

This sale was previous to the adoption of the provision contained in section 14, chapter 115, Gen. Stat. 1865 (Wagn. Stat. 935), securing the husband's interest in his wife's real estate from sale upon execution against him; and defendants do not bring themselves within the act of 1849, as contained and re-enacted in the revision of 1855, p. 754.

The marital interest, therefore, of Garrard Long in the property passed to the purchaser; and if Mrs. Long's defense had been fully made, it would have availed her nothing.

Judgment affirmed. The other judges concur.

DANIEL RANSOM, Respondent, *v.* GENTRY COUNTY, Appellant.

1. *County, liability of for expense of guarding prisoner — Change of venue — Failure of county to build jail.* — Where a prisoner indicted for a felony in one county is removed by change of venue to another, not provided with a sufficient jail, the former county is not liable for the expenses of guarding the prisoner in the latter, when the cost arose from a failure of the county to provide such jail. The county failing to provide the jail must bear the expense. (See Wagn. Stat. 787, §§ 19, 20.)

Appeal from Gentry Circuit Court.

Caldwell, *Heren* and *Reed*, for appellant.

The expenses were all incident to the trial of the prisoner, and as he was charged with a felony, the State was liable for the expenses incident to his trial, and not the county of Gentry. (Wagn. Stat. 348, §§ 1–4; *id.* 625, § 14.)

Lewis, *Strong* and *Hedenburg*, for respondent.

Under the statute (Wagn. Stat. 787, §§ 19–20; *id.* 351–2, § 19) the judgment is correct as far as it goes. But the judgment of the court ought to have been for the whole bill.

BLISS, Judge, delivered the opinion of the court.

William A. Hundley was indicted for murder in the Circuit Court of Gentry county; a change of venue was awarded to DeKalb county, and it became the duty of the sheriff of Gentry to transfer the prisoner to said county. (Gen. Stat. 1865, ch. 212, § 28; Wagn. Stat. 1098.) But there being no sufficient jail in DeKalb, the prisoner was taken to the Buchanan county jail; thence he was taken for trial to the DeKalb Circuit Court at the March term, 1869, when the cause was continued, and he was remanded. At the September term following he was tried and convicted. The plaintiff, who was sheriff of DeKalb county, makes out a bill of costs against the appellant; and, upon an agreed state of facts, the question of the liability of the county to pay the bill was submitted to the Gentry Circuit Court. The bill embraced costs for guarding and transporting the prisoner, and for guarding him during the two terms of court at which he appeared. The Circuit Court allowed the items for guarding the prisoner during such terms, and gave judgment for the amount, but rejected the others. Both parties complain of its action, although the defendant alone appeals.

It is not disputed that, for the taxable costs, the State and not the county is liable; but the county was held liable for those items because there was no jail where the cause was tried, and it became necessary for the sheriff to guard the prisoner. It was the duty of the sheriff where the prisoner was confined to produce him before the Circuit Court of the county appointed for his trial. (Gen. Stat. 1865, ch. 223, § 22; Wagn. Stat. 787.) And when so produced and delivered to the sheriff of such county, what is to be done with him? The sheriff must take charge of him; and if there is no jail, or if the jail be insufficient, the prisoner must be guarded, under the provisions of section 19 of the chapter last referred to.

The statute makes no provision for taxing in the bill of costs the expenses of thus guarding the prisoner; hence the State cannot be required to pay them. But their payment is expressly charged upon the county by section 20 (Wagn. Stat. 787), which

reads as follows: "The expenses of said guard to be audited and paid as other county expenses."

The reason for thus charging the counties with the expenses of guarding prisoners charged with felonies, instead of the State, which pays the other costs, arises from the fact that the law requires them to build jails; and if they neglect so plain a duty, the State at large ought not to suffer in consequence. But the county of Gentry was not thus in fault; and it does not appear that if there had been no change of venue, any such guarding would have been necessary, nor could its authorities prevent the remanding of its prisoners to other counties for trial. The neglect was in the authorities of DeKalb county. They had furnished no place for the safe-keeping of prisoners to be tried by its court, and the obligation to furnish such place is just as imperative where there has been a change of venue, as where the offense was committed within the boundaries of the county.

The language of the statute also refers to the county where the prisoner is held in custody. The expense can only be incurred "with the sanction of the judge of the court having criminal jurisdiction for his (the sheriff's) county, or any two justices of the County Court of his county," and must "be audited and paid as other county expenses."

We could not find that the authorities of one county are authorized to incur expenses in a great measure discretionary, to be charged to another county, unless the statute plainly so provides; hence the manner in which the expense is incurred, as well as the reason for the necessity of incurring it, and the natural meaning of the language of the statute, compel us to find that the Circuit Court erred in charging this expense to Gentry county; and the other judges concurring, its judgment will be reversed.

JAMES REID, JR., Respondent, *v.* A. W. MULLINS, Appellant.

1. *Deed of trust — Surplus, payment of — Creditor, claim of to surplus by reason of purchase of land and notes.* — A trustee in a deed of trust cannot refuse to pay over to one who has purchased the encumbered property subject to the trust, any surplus after satisfying the trust notes, on the ground that the purchase was without consideration and a fraud upon creditors. Until set aside in a direct action by the creditors, such sale will stand, and strangers will not be permitted to prove the fraud. And he cannot refuse so to pay over the surplus on the ground that the purchaser at the trust sale had already become the owner of the land and the assignee of the notes, and thus claimed to be entitled to the money. The rights of the creditor cannot be passed upon in this collateral manner.

Appeal from Linn Circuit Court.

As appears from defendant's answer, the property bid in by Waters and Cave, as stated in the opinion of the court, was sold to them in 1860, which was after the deed of trust, and after the date of the deed from Reid, Sr., to Reid, Jr., but before the sale under the trust deed.

A. W. Mullins, for appellant.

The deed from James Reid, Sr., to James Reid, Jr., the plaintiff, was utterly void. (Wagn. Stat. 280, § 2.) The question as to the validity of that deed could properly be raised by the defendant's answer in this suit. And if the deed was fraudulent and void, the plaintiff had no right to the surplus fund in controversy. (Every v. Edgarton, 7 Wend. 259.) The equity of the case is certainly against the plaintiff.

Easley and *G. D. Burgess*, for respondent.

The motion to strike out part of the answer of appellant was properly sustained. The matter stricken out was an attempt upon the part of one who was neither a creditor nor purchaser to attack a conveyance for an alleged fraud. (1 Sto. Eq., § 371; McLaughlin v. McLaughlin, 16 Mo. 243.) It was also an attempt to litigate the rights of Waters and Cave, who are not parties to the suit. If the appellant wanted to raise the ques-

tions set up in that part of his answer, he should have caused Waters and Cave and respondent to interplead for the fund. (2 Sto. Eq. ch. 22, p. 12 *et seq.*)

BLISS, Judge, delivered the opinion of the court.

Defendant was named as trustee in two deeds of trust executed by James Reid, Sr., father of plaintiff, both for the benefit of John H. Ware, one to secure a note of $500, and the other a note of $450 and interest; and afterward the said Reid, Sr., conveyed the same property to the plaintiff, subject to said deeds of trust. Upon maturity of the notes the trustee sold the property, which was bid in by R. G. Waters, for the use of the firm of Waters & Cave, for the sum of $1,400, and a deed was executed reciting the bid. This suit was instituted to recover of Mullins, the trustee, the balance in his hands over and above the amounts due upon the notes named in the trust deed.

Among other things, the defendant set out in his answer that James Reid, Sr., was largely involved in debt over and above the notes secured by the trust deed, and more than he was able to pay, the said Waters & Cave being among his creditors; that the deed to his son, the plaintiff, was without consideration, and made to defraud his creditors; that the said Waters & Cave put their claim in judgment, and levied on and sold the interest of Reid, Sr., in the property, bidding it in themselves; that they also purchased the notes secured by the trust deeds, and at the sale by defendant owned the same; and that at said last sale no money, in fact, was paid to defendant, but the notes were delivered up to him and canceled.

So much of the answer as sets out these facts was, on the plaintiff's motion, stricken out by the court; and thus the question is now presented whether, in this action, the facts so set out constitute any defense.

It is of no consequence whatever to defendant whether the sale to the plaintiff was honest or not; until set aside at the suit of the creditor, it will stand, and strangers will not be permitted to prove the fraud. The defendant was a trustee for both the other parties to the deed, and, after paying the debt, held the surplus for

the benefit of the grantor or his assigns. The plaintiff was the assignee, and was entitled to it until some one else should establish his right. The trustee has no right to act as attorney for a creditor, and assume or show, in excuse for not paying over the money, that such creditor might have an equitable claim to it if he should choose to pursue it. And besides, a decision in this case will not conclude the creditor. He is not a party, and is not asserting his right; and whatever the decision now, may hereafter prosecute his claim by another proceeding. His right cannot be passed upon collaterally, and the court will not attempt to do so.

It may be said that the facts set up show that the creditor was entitled to the money, and the trustee was not bound to collect it from him. But the trustee stands wholly impartial between the parties, and he must be treated as though the whole bid was paid over to him as recited in his deed, and the surplus was paid to the creditor. He thus not only places the parties in a different position by making it necessary for the debtor's assignee to sue for the surplus, but he assumes to decide upon the legality of a conveyance good upon its face, and good upon the facts assumed, against all the world except the creditor, and which *he* might never impeach. This is not an impartial execution of his trust; and that he may have decided correctly is no excuse for interference in a matter outside of his duties as trustee.

Judgment affirmed. The other judges concur.

SAMUEL L. WYNN AND WIFE, Respondents, *v.* ABRAHAM CORY, Appellant.

1. *Evidence — Hearsay — Declarations of persons since deceased.* — The declarations of persons since deceased, against their interest at the time the declarations were made, constitute an exception to the rule excluding hearsay evidence. But to render them admissible it should appear that the deceased knew the facts, or that it was his duty to know them; that his declarations were at variance with his interest at the time they were made. The weight of such testimony is a matter to be determined by the jury.
2. *Practice, civil — Pleadings — Limitations, statute of, to be available should be invoked in the lower court.* — A defendant, in order to avail himself of the statute of limitations, should insist upon it in his defense, and not invoke it for the first time in the Supreme Court.

Appeal from Livingston County Circuit Court.

Mrs. Wynn, it appears, was half-sister of Alva Peery, son of Henry W. Peery, and, as plaintiffs claim, inherited from Alva, who acquired title under the will of his father.

For facts in the case see opinion of the court, and same case as reported in 43 Mo. 301.

McFerran, for appellant, among other points presented, contended that the court below erred in admitting the declarations of Archibald Peery, deceased; citing Stewart v. Thomas, 35 Mo. 202; Dickerson v. Chrisman, 28 Mo. 134; Turner v. Belden, 9 Mo. 797; Wilson, Adm'r of Owen, v. Woodruff, 5 Mo. 42, 43; Foster v. Nowlin, 4 Mo. 18; Criddle v. Criddle, 21 Mo. 522.

H. M. & A. H. Vories, for respondents.

I. The declarations of Archibald Peery after his deed to Henry W. Peery, and the declarations of his heirs claiming under him after his death and before their conveyance to defendant, who claims under them, coupled with evidence of defendant's knowledge of the claim and rights of the plaintiff Josephine at and before his purchase, were properly admitted in evidence. (Dickinson v. Chrisman, 28 Mo. 134; McLaughlin v. McLaughlin, 16 Mo. 250; Davis v. Spooner, 3 Pick. 284; Cow. & Hill's notes, 652; Bridges v. Eggleston, 14 Mass. 244; 1 Greenl. Ev. 189.)

II. In this case the statute of limitations was neither pleaded as a bar nor relied on in the answer. All statutes of limitations, to avail defendant, must be pleaded. If not pleaded, plaintiff has a right to presume that the statute is waived, and would come to trial unprepared to meet such a defense. (Heath v. Page, 48 Penn. St. 142; Hayden v. Stone, 1 Duvall, Ky., 396; Benoist v. Darby, 12 Mo. 196; Howell v. Howell, 15 Wis. 55.)

CURRIER, Judge, delivered the opinion of the court.

This is a suit in equity to restrain the defendant from disposing of the premises described in the petition, and to divest him of his apparent title, and to vest the same in the plaintiff, Josephine

Wynn. The case was previously here, and is reported in 43 Mo. 301.

It is alleged in the present petition that Archibald Peery was the owner of said premises in March, 1852, and that he at that time conveyed the same to his son Henry W. Peery, by a deed duly executed and delivered, and that the deed so executed and delivered was subsequently lost or destroyed without having been recorded. The plaintiff's asserted rights depend upon the fact of the execution and delivery of this deed, and that fact is put in issue by the pleadings.

It is shown by the evidence that Archibald Peery, prior to the supposed execution of the deed, declared his purpose to convey said land to his said son, and that he subsequently stated that he had made the conveyance as he had proposed to do. It further appears that he was present when his son's will was executed, that the will was read over in his presence, and that it contained a bequest of the lands in question to the wife and daughter of the testator, and that he was inquired of after the son's death in regard to the deed, the administrator of the deceased being unable to find it, and that he again recognized the existence of the deed, stating that the last time he saw it, it was in his son Henry's possession, or in his drawer — or words to that effect. No question is made as to the weight or sufficiency of this evidence, if admissible, to prove the facts asserted. The evidence is assailed as wholly incompetent, and its admission was objected to on that ground.

Archibald Peery's statements and declarations are objected to as being mere hearsay testimony, and therefore inadmissible, as the defendant insists. These statements and declarations undoubtedly belong to the class of evidence usually denominated hearsay, but it does not thence follow that the court committed error in admitting them in evidence, for there are limitations and exceptions to the rule excluding such testimony. The declarations of persons since deceased, against their interests at the time the declarations were made, constitute one exception to the rule rejecting hearsay evidence. In order, however, to make such declarations admissible, it must appear that the declarant is

deceased, that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest at the time they were made. "When these circumstances concur," says Greenleaf, "the evidence is received, leaving its weight and value to be determined by other considerations." (1 Greenl. Ev., 9th ed., § 147.) The same rule is laid down by Phillips in his work on evidence. (1 Phill. Ev., Cow. & Hill & Edw. notes, 5th Am. ed., 244, § 7.)

In Davis v. Spooner, 3 Pick. 284, both parties claimed under a deed from "S.," as both parties here claim to derive title from Archibald Peery. The deed by which the demandant claimed, (as in the present case) was the oldest, and was unrecorded. The defendant purchased with actual notice of the first deed. That being shown, and that the grantor had fraudulently obtained and suppressed the first deed, it was decided that his declarations were admissible to prove its existence and contents, as coming from one under whom the defendants claimed. This decision is an illustration of the rule laid down by Greenleaf, and was cited and approved by this court in Dickerson v. Chrisman, 28 Mo. 139; see also McLaughlin v. McLaughlin, 16 Mo. 250; and Johnson v. Quarles, 46 Mo. 423.

In the case now before the court, the declarant must have known the facts attested by him. He knew whether he had executed a deed to his son, as he represented the fact to have been. His declarations were against his interests, and he has since deceased, and cannot therefore be produced upon the stand as a witness; his statements, therefore, under the circumstances, according to the rule laid down in the books, were receivable in evidence for what they were worth. Their weight and value is another matter. Their admissibility, however, is the only point insisted upon by the defendant. Coupled with the other evidence in the case, they abundantly sustain the allegation that Archibald Peery conveyed the disputed premises to his son Henry, as the petition avers, and his title has descended to and vested in Mrs. Wynn — the defendant having purchased, as the evidence shows, with a very full knowledge of her rights.

But the defendant makes the further point that the petition shows upon its face that the action is barred by the running of the statute of limitations. It is averred in the petition that the defendants, in October, 1856, accepted from George C. Peery and Mitchell S. Peery, two brothers of the deceased, Henry W., a quit-claim deed of the premises, and that he fraudulently entered into possession of the property. The whole transaction between him and the Peery brothers is charged to have been a fraudulent conspiracy against Mrs. Wynn, she then being a mere child, and without any guardian to protect her interests. But the petition does not show, except inferentially, when that possession was taken, nor whether it was continuous and uninterrupted under claim of title. The petition states a good cause of action, and contains no averments sufficient to show that the cause of action sued on is barred by the statute. Besides, if the defendant would avail himself of the statute of limitations he should have insisted upon it in his defense, which he did not do. It is not set up in the answer as a bar to the suit, and is not alluded to in the evidence. The defendant testified in his own behalf, but made no reference to his possession, its character or duration.

This matter of the statute of limitations is evidently an afterthought. The judgment of the Circuit Court was for the plaintiff, and I think it should be affirmed. The other judges concur.

J. W. FINNEY, Respondent, *v.* SULLIVAN COUNTY, Appellant.

1. *Registration, board of—Witnesses before, not entitled to fees.*—Persons summoned as witnesses before a board of registration held in a given county, under the registration act of 1866 (Gen. Stat. 1865, pp. 908-9, §§ 20, 27), are not entitled to payment of witness fees from the county. Said sections authorize no such payment, and the county cannot be held liable therefor without some express statute to that effect. The registration officers cannot bind the county as its agents by their act in summoning the witnesses. They are not agents of the county, but of the State. The county is no party to the proceeding.

Appeal from Sullivan Circuit Court.

Eubanks & Butler, for respondent.

Officers of registration, while discharging their duties as such, are invested with full power to compel the attendance of witnesses before them; and hence, by implication, the witnesses have a right to demand and recover compensation for their services as such. (Gen. Stat. 1865, p. 908, § 20.)

G. D. Burgess, for appellant.

CURRIER, Judge, delivered the opinion of the court.

This suit was brought to recover of Sullivan county (the defendant) the sum of $2.76 for services rendered by the plaintiff in 1866, in attending before the board of registration in that county as a witness. It is admitted that the services charged were rendered in obedience to the requirements of a subpœna duly issued by the board and served upon the plaintiff. There is no dispute about the facts. The single question presented is whether the county, under the circumstances, is legally bound to pay the claim.

As showing such obligation on the part of the county, the plaintiff's counsel refer to sections 20 and 27 of the registration act of 1866 (Gen. Stat. 1865, pp. 908–9). The twentieth section authorizes the registration board to "issue subpœnas, attachments and commitments," and directs their service by sheriffs and constables in the same manner as though issued by a judge of the Circuit Court. It is then provided that these officers shall receive the same fees for the service of such processes as are allowed by law for such services in State cases, and that the same shall be paid by the person against whom the process is issued, or out of the county treasury. The section makes no provision for the payment of witnesses from any source or fund whatever, or for their payment at all. It therefore makes no provision for their being paid by the county. Section 27 merely makes provision for the payment to the officers of registration of such expenses as may be incurred by them. As the plaintiff was not such officer, but a witness merely, there is nothing in this section to support the

claim preferred by him. In a word, the law makes no provision for the compensation of witnesses who are summoned to appear before registration boards. On what principle, then, is the county to be held liable for these fees? The registration officers were appointed by the supervisor of registration, who was appointed by the governor. They were not the agents of the county, nor was the county a party to the proceedings before the board. (See Kelley v. Andrew County, 43 Mo. 338.) The county cannot be made liable for the fees of witnesses summoned to attend upon the registration officers, without some express statute on that subject imposing the liability, and there is no such statute. (Rawley v. Commissioners of Vigo County, 2 Blackf. 355; Commissioners of Miami County v. Blake, 21 Ind. 32; State v. Daily, 45 Mo. 156.) The county of Sullivan is therefore not liable for the plaintiff's claim.

It is no new doctrine that citizens may be compelled by the State to attend as witnesses in causes where the State is interested, without being compensated pecuniarily for their services. "The king or any person suing to his use," says Blackstone, "shall neither pay nor receive costs, for * * as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them." (3 Blackst. 400.) In Commissioners of Miami County v. Blake, *supra*, the court say that "this principle, so far as it applies to the payment of costs by the State, has been adopted as a general principle of American law." On the same ground costs are never paid by the United States. (United States v. Buskin, 2 Wheat. 395.) The plaintiff in the case at bar was summoned to appear and testify in regard to a matter of general public interest, and in a proceeding to which the county was not a party. He appeared at the command of the State, and the State has made no provisions for compensating him for his trouble. The law imposes no obligation upon the county in respect to the matter; and the judgment, which was for the plaintiff, must be reversed. The other judges concur.

C. J. CABELL *et al.*, Respondents, *v.* JAMES GRUBBS *et al.*, Appellants.

1. *Attachment, general judgment in — Fieri facias not absolutely void.* — The attachment act of 1825 (R. S. 1825, p. 144 *et seq.*) contemplated a general judgment in attachment suits. But under its provisions, the attached property alone was to be taken on execution. However, a general *fieri facias* on such a judgment would not be absolutely void. It would furnish the sheriff with sufficient authority to levy it upon the property attached.
2. *Execution sale — Where execution is regular on its face, purchaser cannot be affected, unless the execution is rendered void by the irregularities.* — Every reasonable intendment should be made in support of the rights of a purchaser at an execution sale. Where an execution is regular on its face, he cannot be injuriously affected by any irregularities in the proceedings which resulted in the sale, unless they were of a character to render the proceedings wholly void. He certainly cannot in any collateral proceeding.
3. *Conveyances — Acknowledgment, defective, what.*—A certificate of acknowledgment which omits the word "acknowledged," and contains no word or words expressive of an equivalent idea, is fatally defective.

Appeal from Chariton Circuit Court.

Chas. A. Winslow, for appellants.

I. The sheriff's deed in this case was made under the statute of 1825, under which the recitals in the deeds were not evidence of a judgment and execution, and persons relying on such deeds must produce valid judgments and executions to sustain them. (R. S. 1825, tit. Executions; McCormick v. Fitzmorris, 39 Mo. 24.)

II. The judgment produced to sustain the deed in the case is void. It is a general judgment rendered on an order of publication alone against a non-resident defendant, and, as such, is absolutely void and does not sustain the deed. (Smith v. Ross & Strong, 7 Mo. 463; Janney v. Spedden *et al.*, 38 Mo. 395; Smith v. McCutchen, 38 Mo. 415; Abbott v. Sheppard, 44 Mo. 273; R. S. 1825, p. 149, § 13.) It cannot be sustained under the attachment law of 1825. It is a judgment *in personam* when it should have been *in rem*, and is therefore fatally defective. (R. S. 1825, pp. 147–8, § 7; Clark v. Halliday, 9 Mo. 711; Johnson *et al.* v. Holley, 27 Mo 594; Latimer v. Union Pacific R.R., 43 Mo. 105; Fithian v. Monks *et al.*, 43 Mo. 520.)

III. The sheriff's deed conveys no title, because it nowhere appears that the land sold and conveyed by the deed was the land originally attached in the suit which resulted in the judgment produced. Unless this was the fact, the sheriff had no authority to levy the execution upon it; the court could make no decree that would bind it, and there would be a total failure of jurisdiction and power in the premises. This fact being essential to the jurisdiction of the court and the execution of the power, should appear affirmatively either on the face of the record or by evidence *aliunde*, and the *onus* is on the purchaser all the time. (Blackw. Tax. Tit. 51–2; Young v. Lorain, 11 Ill. 636; Thatcher v. Powell, 6 Wheat. 119; Denning v. Corwin, 11 Wend. 648; Sharp v. Speir, 4 Hill, N. Y., 86; Cook v. Hacklemann *et al.*, 45 Mo. 317; Gibbons v. Steamboat Barker, 40 Mo. 253; Stierlin v. Daly, 37 Mo. 483; Ruby v. Huntsman, 32 Mo. 501; Shaffner v. St. Louis, 31 Mo. 264; Farrar *et al.* v. Dean, 24 Mo. 16; Reeds v. Morton, 9 Mo. 287; Crook v. Peebly, 8 Mo. 344; Morton v. Reeds, 6 Mo. 64; Lind v. Clemens, 44 Mo. 540; Leslie v. St. Louis, 47 Mo. 474; Maupin *et al.* v. Emmons *et al.*, 47 Mo. 304, and cases under second point; Durrossett's Adm'r v. Hale, 38 Mo. 346.)

IV. The deed is defectively acknowledged (Laughlin v. Stone, 5 Mo. 43; Stanton v. Button, 2 Conn. 527; Hayden v. Wescott, 11 Conn. 129; Jacoway v. Gault, 20 Ark. 190; Tully v. Davis, 30 Ill. 103; Alexander v. Merry, 9 Mo. 514), and is therefore equivalent to not being acknowledged at all, and hence conveys no title. (Moreau v. Detchemendy, 18 Mo. 522; Moreau v. Branham, 27 Mo. 351; Allin v. Moss, 27 Mo. 354; Ryan v. Carr, 46 Mo. 483.)

Prewitt, for respondents.

I. The statute did not require a special judgment, but a judgment as in other cases.

II. The acknowledgment of the sheriff's deed is sufficient. The statute does not require any particular words to be used. The recitals therein identify the deed on which it is indorsed. (Crowley v. Walker, 12 Mo. 143; Scruggs v. Scruggs, 41 Mo. 242;

Alexander v. Merry, 9 Mo. 251.) If the certificate imports that it is acknowledged, that is enough; and this cannot import anything else. Every one reading it knows that it was acknowledged by the sheriff. (Alexander v. Merry, 8 Mo. 514; Jackson v. Gilchrist, 15 Johns. 89; 2 Cow. 552; 5 Wend. 561; 24 Wend. 87; 19 N. Y. 279.)

CURRIER, Judge, delivered the opinion of the court

This is an ejectment suit, and the plaintiff's title rests upon a sheriff's deed executed in pursuance of an execution sale held in March, 1830. It is objected that the judgment and execution under which the sale was had were invalid. The judgment was rendered in an attachment suit, the defendant in the attachment not appearing. It was general and *in personam*. The execution followed the judgment, and was of like character. It described no property and pointed to no attachment. These proceedings were had under the attachment act of 1825 (R. S. 1825, p. 144 *et seq.*), and must be judged by that enactment. The act referred to provides (§ 7) that judgments upon constructive notice in attachment cases, where the defendant makes default, shall be entered as in "other cases" for the amount found to be due. It was, however, further provided in the same section that such judgment should "bind only the property attached," and that no execution thereon should be issued against any other property; and further, that the judgment should be no evidence of debt in any subsequent suit. The fourteenth section of the act provided that the execution should be levied upon the property taken upon the attachment.

It is thus seen that the statute contemplates a general judgment in attachment suits as in "other cases," but that the judgment was nevertheless limited in its effect to the attached property. That alone was to be taken in execution. The judgment in question, therefore, does not seem to be objectionable either in form or substance. But the execution was an ordinary *fieri facias*, following the judgment but not the law, since the law forbade its issue against any other property than that attached. Still the error in the execution did not render it absolutely void.

It furnished sufficient authority to the sheriff to levy it upon the attached property, as pointed out and directed by the statute.

The defendants, however, object that it does not appear that the property levied upon and sold by the sheriff was the same property which was taken upon the writ of attachment. This is an objection to the levy, and not to the execution or to the judgment. The execution upon its face showed authority in the officer to make the levy and sale. Are we to presume, in the absence of evidence, that the execution was levied upon the wrong property — that is, upon property not attached? It seems to me not. (Every reasonable intendment should be made in support of the rights of the purchaser at the execution sale. The execution was regular upon its face, and the purchaser looked to that. He cannot be injuriously affected by any irregularities in the proceedings which resulted in the sale, unless they were of a character to render the proceedings wholly void — mere nullities; at least not in this collateral way. (Draper v. Bryson, 17 Mo. 71.) The defendants' suggestion is that the sale might have been of property not attached, in which case it would be void. But it does not appear that the sale was of other property than that attached; and that it was so is not to be presumed in the absence of evidence showing the fact, and especially where the presumption would prejudice the rights of a *bona fide* purchaser. The numerous tax cases referred to have no application here.

But the deed is further objected to as unacknowledged, and this objection seems to be well founded. The acknowledgment was essential, and the proof of it is wanting. The sheriff appeared before the court, apparently for the purpose of acknowledging the deed, but that he did so does not appear. The paper read in evidence as the certificate of acknowledgment fails to show what was done, beyond the fact that the sheriff appeared before the court. The certificate not only omits the word "acknowledged," but contains no word or words expressive of any equivalent idea. To hold this acknowledgment good, would be equivalent to holding a sheriff's deed good without an acknowledgment. The omission may have been the merest inadvertence, but it is an omission which the court cannot supply. It consti-

tuted the vital part of the acknowledgment, and no rational liberality of construction can cure the defect. In a word, the certificate contains nothing on the point in question to construe. The decided cases sustain these views. In Connecticut it is held, where the certificate was, "Personally appeared A. B., signer of the above instrument, to be his free act and deed," etc., that the words imparted no acknowledgment, and that the omission could not be supplied by intendment or construction. (Stanton v. Button, 2 Conn. 527.) The decision in Hayden v. Wescott, 11 Crum. 129, and in Tully v. Davis, 30 Ill. 103, are to the same effect. The decisions in this State (12 Mo. 143; 9 Mo. 510; 41 Mo. 242), referred to by plaintiffs' counsel, are far from sustaining the views he advocates. The acknowledgment in the case at bar was manifestly bad, and the deed should have been excluded. But the court admitted it and rendered judgment for the plaintiff, and the judgment must be reversed and the case remanded. The other judges concur.

JOSEPH LANGDON, Respondent, *v.* SAMUEL M. MARKLE, Appellant.

1. *Surety — Notice by to sue, when not in writing, is no protection to.* — Notice by a surety on a note to the holder thereof to sue, when not in writing, is not binding upon the holder, either under the statute (Gen. Stat. 1865, p. 406, § 1; Wagn. Stat. 1302, § 1) or at common law; and his neglect to comply with such notice will not release the surety.
2. *Promissory note based on contract, suit on — Recoupment.* — Where a note grows out of a contract and is executed in pursuance of its stipulations, any questions of recoupment between parties to the note should be treated as though the suit had been on the original contract itself.

Appeal from Buchanan Circuit Court.

The note referred to in the opinion of the court was given in pursuance of a contract made between Boone and Smith, in which Smith assumed to grant Boone the exclusive right to sell and put up certain patent copper scroll lightning-rods in various counties in Missouri, and also in the counties of Brown and Doniphan

in Kansas. In consideration of this grant, Boone, among other things, was to purchase his rods exclusively of said Smith, at prices therein agreed upon, payment to be made by note in bank, due sixty days from date. Shortly after Boone entered upon the canvass of his Kansas territory, his right to further proceed was disputed by one Wait, who claimed that he had the paramount title to the counties of Brown and Doniphan in Kansas, and that Boone's grantor never possessed any title thereto. This fact was communicated to Smith, who, in reply, admitted that he never possessed the right to the two counties in Kansas he had assumed to grant him, and offered to make up the loss by the grant of other counties in Missouri to which he had title. This Boone refused. After the maturity of the note, Langdon, as the agent of Smith, presented it to Boone for payment, which was refused. Langdon then demanded payment of Markle, the surety, and was told by Markle of the relation he sustained to Boone on the note, and was verbally notified that Smith must commence suit at once against Boone, as he was then solvent. This Smith refused to do, and on the 24th day of July, 1869, after Boone had become insolvent, suit was commenced on the note against Markle, the surety, by Langdon, who had become in the meantime the assignee of the note.

For further facts see opinion of the court.

Everett Reed and *B. F. Loan*, for appellant.

I. At common law a surety is discharged if he give verbal notice to sue, and the statute must be construed as cumulative merely; for a remedy conferred by an affirmative statute does not take away the common-law remedy unless it contains negative words. (Sedgw. Stat. Const. Law, 38–40, 93, 402–5; 14 Wend. 255; 18 Wend. 220; 3 Hill, 41; 20 Johns. 292; 5 Johns. 175; 13 Johns. 321; 15 Johns. 220; 5 Cow. 165.) The same principle has been applied with respect to statute law by this court in 37 Mo. 599; 38 Mo. 534; 41 Mo. 460–1. In such cases a party may make his election to proceed at statute law or common law. (6 Bac. Abr. 177.)

II. The Kansas territory was the principal consideration, the

chief inducement to Boone's making the contract with Smith; and yet at the very time Smith assumed to grant Boone the exclusive right to this territory, he did not possess the right to put up a single rod in Kansas. Here is clearly a fraud. To say the least, there is a breach of contract on the part of Smith. And in either case, if the purchase money has not been paid, defendant may recoup the damage he has sustained. (1 Comst. 305; 44 Mo. 389; 20 Mo. 433.)

III. The circumstance that this action is upon the note does not injuriously affect this case, for the contract itself provides that notes should be given in payment of the rods therein contracted for; so that the legal effect of suing on this note is to enforce the original contract, and the same defense can be introduced as though the action was in form upon the contract. (3 Hill, 175.)

Hill & Hawley, for respondent.

I. Defendant, if only a surety, is still liable to pay the debt, unless he shows that he has given notice in writing to the holder of the note to forthwith commence suit thereon against the principal debtor and other parties liable. (Gen. Stat. 1865, p. 406, ch. 92, §§ 1–3; Sappington v. Jeffries, 15 Mo. 628; Freligh v. Ames, 31 Mo. 253; Routon v. Lacy, 17 Mo. 399; Christy v. Horn, 24 Mo. 242; Lockridge v. Upton, *id.* 184; Perry v. Barnet, 18 Mo. 140; Simpson v. Blunt, 42 Mo. 542; Rucker v. Robinson, 38 Mo. 154; McCune v. Belt, *id.* 281; Pitts v. Fugate, 41 Mo. 405; Headlee v. Jones, 43 Mo. 235; Wiley v. Hight, 39 Mo. 130; Weller v. Ranson, 34 Mo. 362; Smarr v. Schnitter, 38 Mo. 478; Cain v. Bates, 35 Mo. 427.)

II. A mere verbal notice is not sufficient. (Freligh v. Ames, *supra*; Driskell v. Mateer, 31 Mo. 325; Gen. Stat. 1865, *supra*.)

III. Even at common law a mere request by the surety to bring suit was not binding on the holder, and his neglect to comply did not release the surety. (Routon v. Lacy, *supra*.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiff acquired the note in suit after its maturity, and consequently took it subject to all equitable as well as legal defenses the makers might have against it. The defendant in this action was a surety.

1. The evidence in relation to the notice to sue was properly excluded, since the notice proposed to be shown was not in writing, as the statute requires. (Gen. Stat. 1865, p. 406, § 1.) Even at common law, according to Judge Scott, "a mere request by the surety to bring a suit was not binding on the holder, and his neglect to comply with such request did not release the surety." (Routon v. Lacy, 17 Mo. 400.)

2. The defendant asked the court to instruct that "if the defendant counted out lightning-rods to the value of the unpaid balance of the note sued on, and the plaintiff was present and accepted said rods in discharge of such balance, the jury should find for the defendant." This instruction was refused, but upon what principle I am unable to conjecture. There was evidence on which to found the instruction, and I think it should have been given. If the defendant tendered to the plaintiff the rods, and the plaintiff accepted them in satisfaction of his debt, the debt was thereby discharged. The transaction constituted an accord and satisfaction.

3. The note was payable to one Smith, and grew out of transactions between him and one Boone, Boone being the defendant's principal on the note. The defendant sought to recoup damages growing out of an alleged failure of consideration and breach of contract between Smith and Boone. The contract formed the basis of the note transaction. The note grew out of the contract and was executed in pursuance of its stipulations. The question of recoupment, therefore, should have been treated as though the suit had been upon the contract itself. (Batterman v. Pierce, 3 Hill, 171; and see Grand Lodge v. Knox, 20 Mo. 433.) The court, at the instance of the defendant, instructed the jury in accordance with this view, and was so far correct. But the court was wrong in telling the jury, in effect, that the sale by Smith to

Boone of the right to vend the patented article mentioned in the contract within certain territorial limits, formed no part or element in the consideration of the note. The grant by Smith of the right to sell as specified, was the express and declared consideration upon which Boone contracted to make purchases of Smith and give his note.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

T. D. PRICE *et al.*, Respondents, *v.* R. O. THOMPSON *et al.*, Appellants.

1. *Estoppel — Park — Land dedicated for common, cannot be diverted to other use, when.*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (Wagn. Stat. 1328, § 8) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." *Held*, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees of the town from diverting the property from its original use and the purpose specified by the donor in the act of dedication, by causing public streets to be run through it.

   The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315–16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.

Appeal from Linn County Common Pleas Court.

On the 27th day of May, 1869, appellants, as trustees of the town of Brookfield, passed an order extending Main street through a piece of ground which had been set apart on the plat of said town by the donor as a park, and also ordering that part of said park on either side of said street, after the same had been opened, to be fenced. After said order was made, this proceeding was commenced by respondents, inhabitants and

property-holders in said town, in the Linn County Court of Common Pleas, against the appellants, as trustees of said town, to enjoin and restrain them from opening and extending said street through said park.

G. D. Burgess, for appellants.

The park being dedicated to the public by the party who laid out the town of Brookfield, the trustees had the right and power to open the street through it. It is unlike the taking of private property for public uses. In such cases compensation is required; but in cases like this, when public property is appropriated to public uses, no compensation is required. The Legislature of the State has the power to appropriate the park to any public use, and its power has been delegated to the town authorities by the act of March 2, 1869. This park being public property—it makes no difference how acquired, whether by gift, grant, or by the exercise of the right of eminent domain—the town authorities had the right to change one kind of its public use into that of another, so long as the property continued to be devoted to public use. (The People v. Kerr, 27 N. Y. 192–3, and authorities cited; Freeholders of Monmouth County v. Red Bank and Holmdel Turnpike Co., 3 C. E. Green, N. J., 91; 7 Am. Law Reg., N. S., 759; Ang. Highw., §§ 84–5; Radcliff's Ex'r v. Mayor of Brooklyn, 4 Comst. 195.)

This case is unlike that of Rutherford *et al.* v. Taylor *et al.*, 38 Mo. 317. In that case the County Court had sold, or was about to sell, public lots to private individuals who purchased them for the purpose of erecting business houses, etc., thereon. It is not contended that the town authorities of Brookfield have the power to sell or dispose of the park for any purpose, but simply that they had the power under the act of the General Assembly of March 2, 1869, as a police regulation, to open a street through it, and that it was no misappropriation thereof as long as it was used for the public. (The People v. Kerr, 27 N. Y. 192–3.)

H. Lander, for respondents.

The act of March, 1869 (Wagn. Stat. 1315–16, § 7), only contemplates cases where compensation can be made — that is, the taking of private property for public uses — and not the taking of public property for some other public purpose.

The town authorities had no constitutional power to unfix that which the original donor had already "named, expressed, or intended" by the terms of his grant. (Warner v. Mayor of Lyons City, 22 Iowa, 355, and cases cited; Rutherford v. Taylor, 38 Mo. 315.) The People v. Kerr, 27 N. Y. 192–3, is not like this case. The street in that case was acquired by the exercise of the right of eminent domain, and not by way of a dedication to a particular public use. So far as the rights of the private plaintiffs were involved in The People v. Kerr, the doctrine of that case is in direct conflict with the decision of our own court in Lackland v. North Mo. R.R. Co., 31 Mo. 180.

WAGNER, Judge, delivered the opinion of the court.

This is a petition for injunction. Plaintiffs state that the original owner of the land on which the town of Brookfield is situated, laid off and recorded a plat thereof, and particularly set forth, marked and designated thereon four acres of land as a "park;" that the fee to said park, by virtue of said plat, was vested in the town, in trust for the free use of all the inhabitants of the town as a common or public ground, and for no other purpose whatever; that the town inclosed the same with a good fence, gates, etc., and embellished the ground with trees, grasses and shrubbery for the purpose of a park; that the same has been and still is used for a park and for no other purpose; that plaintiffs have property with valuable improvements thereon now adjoining to and fronting on said park, which they purchased and improved upon the faith that the park was then and ever would remain a public park; that the defendants, in their capacity of trustees of the said town, were about to open the park, destroy the fencing, grasses and trees, and cause public streets to be run through the same, to the great damage of the

plaintiffs. The defendants in their answer admitted the material statements charged in the bill, but by way of defense relied on an order of the board of trustees directing a public street to be opened through the park; alleged that the public necessities required the street to be so opened, and denied that any injury would result to plaintiffs by running the street as contemplated.

The court, upon a hearing of the case, made the injunction perpetual, and the defendants appealed.

The evidence for the plaintiffs substantially sustained the allegations in the petition, whilst the evidence introduced by the defendants went simply to show the amount of damages that the plaintiffs would suffer in consequence of opening the street.

The town of Brookfield was incorporated under the statutes of this State, and they provide that the maps and plats of cities, towns, villages and additions, made, acknowledged, certified and deposited with the recorder, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described, or intended for public uses in such city, town or village when incorporated, in trust for the uses therein named, expressed, or intended, and for no other use or purpose. (Wagn. Stat. 1328, § 8.) When the town authorities ordered the opening of the streets through the park the act of March, 1869, was in force, which gives power to the boards of trustees in towns "to open and form public squares, avenues, drains and sewers, and to keep the same clean and in order; to locate and lay out new streets and alleys, and to widen streets heretofore laid out and opened in such town, and to appoint three (3) commissioners to assess the damages done to the property upon which such street or alley may be located." (Wagn. Stat. 1315, § 7.)

It is obvious that the board of trustees derived no authority for their action from this last-quoted section, for they did not attempt to proceed under it, or comply with its provisions in reference to laying out streets and widening the same. The park was public property; and whether they could divert it from its original use and the purpose specified by the donor in the act of dedication, is the question. The property did not inure nor was it acquired by the exercise of the right of eminent domain. There is no act

of the Legislature directing what use shall be made of the corporate property; and therefore the case of The People v. Kerr, 27 N. Y. 188, which is cited as the leading authority for the appellants, is not applicable.

The proprietor of the town in his plat, laid off, set aside and dedicated the four acres for the purposes of a public park. The statute declares that the plat, when recorded, shall vest the title of the property in the town, "in trust for the uses therein named, expressed, or intended, and for no other use or purpose."

In the case of Rutherford *et al.* v. Taylor *et al.*, 38 Mo. 315, it was held that the owners of lots facing the square, who had purchased their lots upon the faith of the dedication of the square to public uses, might bring their bill to enjoin the erection of buildings upon the square by individuals. In that case the county, which possessed the fee to the lots in the square, had sold them to private individuals to build upon; but we decided that it would be an act of bad faith toward those who had purchased and improved property — relying upon the fact that the square was dedicated, appropriated, and would continue to be used, for the purposes of a public square—to allow these buildings to be put up.

In Abbott v. Mills, 3 Verm. 521, the dedication was of a public square left in a village, around which the inhabitants had built their houses; and it was held a sufficient dedication that the proprietors of the town had exhibited such a square upon the plan of the town, and had suffered persons to go on and incur expense in erecting their houses, although they had not marked off the same by monuments on the ground; and they were accordingly prohibited from making use of the land for purposes inconsistent with its use as public square.

So in Iowa the court fairly decided the question that when a portion of ground is dedicated by the original proprietors of a town or city for the purposes of a public square therein, the municipal authorities cannot sell the same or divert it to uses and purposes foreign to those for which the dedication was made. (Warren v. The Mayor of Lyons City, 22 Iowa, 351.) Nothing, I think, can be clearer than that if a grant is made for a specific, limited and definite purpose, the subject of the grant cannot be

used for another and a different purpose. The town took the premises as a trustee with the obligations attached, as well as the privileges conferred, and it was not competent for it to divert them to a use or purpose foreign to the expressed intention of the grantor.

The judgment should be affirmed. The other judges concur.

ELIAS HENRY, Appellant, *v.* FRANK D. BEERS, Respondent.

1. *Practice, civil — Trial, waiver of — Entry of waiver on record — Jury, court sitting as, must weigh evidence.* — When plaintiff waives his right to a jury trial, that waiver concludes him; and an entry of such waiver in the record will conclude this court from further inquiry as to the fact of such waiver.

Where jury is waived, the court, sitting as a trier of the fact, must determine the weight of the testimony.

Appeal from Cameron Court of Common Pleas.

McCandless and *Henry*, for appellant.

S. H. Corn, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff in his petition alleged a partnership and asked for an account, etc., but on the trial the whole matter was treated by the parties as a simple indebtedness between the plaintiff and defendant.

The cause was tried before the court sitting as a jury, and a verdict was found and judgment rendered for the defendant for thirty-six dollars. From this judgment the plaintiff has appealed. It is objected on behalf of the plaintiff that he was entitled to a trial by jury, but the record contains an entry that the "plaintiff waives his right to a jury trial." That waiver, under the statute, concludes him, and the record concludes us from further pursuing the inquiry. There is really no question of law worthy of being noticed in this case. The essential merits turned wholly upon the evidence, and the weight that properly belonged to it was for the court, as the trier of the fact, to determine. We see

nothing in the matter of instructions that could have misled the jury, or worked anything to the prejudice of the appellant.

With the concurrence of the other judges, the judgment will be affirmed.

ABRAHAM S. RHODES *et al.*, Appellants, *v.* GEORGE W. OUTCALT AND THE MERCHANTS' BANK OF ST. LOUIS, Respondents.

1. *Notice sufficient to put one on inquiry sufficient.*—Notice sufficient to put one upon inquiry as to the existence of a right or title, is in law presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right notwithstanding the exercise of due diligence.
2. *Mortgages and deeds of trust—Mistake in description—Grantee treated in equity as purchaser of land intended to be conveyed—Rights of purchaser having knowledge of mistake—What facts sufficient to put upon inquiry.*—A. owned city property designated as "lots 10, 11 and 12, in block 7." He made a deed of trust intending to convey the same, but, by mistake, the land described in the deed was lots of corresponding numbers in block 6, wherein he owned no real estate.

   Held, 1st, that notwithstanding said false description, the grantee in equity actually secured a lien on the property intended to be conveyed; and not a lien merely, but his rights were such that he would be regarded in the light of an actual purchaser. The debtor was bound in conscience to correct the mistake. And his obligation to correct it was such an equity as would bind his heirs, voluntary grantees and purchasers with notice. 2d, that where a creditor of A. subsequently had the land in block 7 sold under a judgment against A., and bought it in—knowing, at the time, of the deed of trust, and of the fact that A. owned the property sold, and not that in block 6—the purchaser had knowledge sufficient to put him on careful and diligent inquiry as to the rights of the grantee in the deed of trust, and that he bought subject to the lien of that deed.

Appeal from Chariton Circuit Court.

Chas. A. Winslow, for appellants.

I. The principle contended for by the bank, that all the parties being creditors seeking a preference made their equities equal, and precluded the court from exercising its jurisdiction to disturb the title acquired by the bank, is not supported by any authority, and is directly in conflict with numerous decided cases

directly in point. (White v. Wilson, 6 Blackf. 448; Chamberlain v. Thompson, 10 Conn. 243; Young v. Coleman *et al.*, 43 Mo. 179.)

II. One of the principles for determining the priorities of equities is that a party taking with such notice of an equity takes subject to such equity. The deed of trust to Rhodes being prior in point of time, and the bank having purchased with notice of the mistake, the notice of the appellants was superior and should have been enforced. (Adams' Eq., 5th Am. ed., 306, 311–12; White v. Wilson, *supra*; Chamberlain v. Thompson, *supra*; Wilson v. Tizzard, 15 Iowa, 495; Steany v. Beach, 11 Ohio St. 283; Young v. Coleman *et al.*, *supra*.)

III. The bank purchased with full notice of the mistake in the deed of trust, having sufficient knowledge or information to put him on inquiry. Applegate is presumed to have made the necessary investigation, and will be held to have had actual notice of everything which the inquiry thus suggested would have disclosed if prosecuted with due diligence. He can only escape the consequences of actual notice by showing a diligent and unavailing inquiry, and the exhaustion of all the available sources of information suggested by his knowledge. And notice to Applegate is notice to the bank in this case. (Speck v. Riggin, 40 Mo. 405; LeNeve v. LeNeve, 2 L. C. Eq., 3d Am. ed., 152 *et seq.*, and note; Williamson v. Brown, 15 N. Y. 534; Baker v. Bliss, 39 N. Y. 70; Allen v. McCalla, 25 Iowa, 482; First National Bank of St. Paul v. Com. Scott County, 14 Me. 77; O'Reilly v. Nicholson, 45 Mo. 165; Benoist v. Darby, 12 Mo. 196.)

Prewitt, for respondents.

I. There is no evidence in this case that the bank or its agents had any knowledge of any conveyance or intention or attempt to convey the lots in controversy by Outcalt to the plaintiffs. The bank having purchased and paid for them, and got the legal title without any notice of plaintiff's claim, has the best equity and the legal title. (2 L. C. Eq. 110.)

II. The petition contains no equity so far as appears therefrom. The conveyance to Rhodes was a voluntary conveyance

without consideration, and raises no equity to correct a mistake against any one with or without notice. (1 Sto. Eq., § 164.)

III. The evidence shows that the bank has at least an equal equity with the plaintiffs, and has the legal title, and the court will not disturb it. A creditor who pays out nothing, but attempts to get a preference over another creditor by taking a mortgage, is not entitled to the aid of a court of equity. He can hold as against other creditors only what he actually gets. (2 Lead. Cas. Eq. 104–5, and cases cited.) He is not a purchaser for value.

IV. Whether we look at the petition (15 Mo. 272; Dougherty v. Mathews, 32 Mo. 520) or the testimony in the case, the question of notice is immaterial; the plaintiffs have no equity, and the decree ought to stand. (1 Sto. Eq., § 176; Young v. Coleman, 43 Mo. 185.)

CURRIER, Judge, delivered the opinion of the court.

This is a suit in equity brought to reform and correct an alleged mistake in the descriptive part of a deed of trust. The case shows that the defendant Outcalt, on the 22d of September, 1862, by his deed of trust of that date, undertook to convey to the plaintiff Rhodes, to secure debts then owing by him to the beneficiaries named in the deed, certain real estate situated in Brunswick, Chariton county, Missouri. The deed described the premises as "lots 10, 11 and 12, in block *six*, of the city of Brunswick." These lots were not then owned by him, but he owned lots of the same numbers in block *seven* of said city, on which his then residence was situated. It was these latter lots that he intended to convey, as does not seem to be questioned. The mistake consisted in locating them in the wrong block — that is, in block 6 instead of block 7. Outcalt was at the same time largely indebted to the Merchants' Bank, one of the defendants herein. In 1863–4 the bank obtained several judgments against him upon these claims, amounting in the aggregate to some $18,000. These judgments remained unsatisfied, and the bank, on the 26th of March, 1868, sued out executions upon them, and caused levies to be made upon lots 10, 11 and 12, in block 7, as the property

of Outcalt. The lots were subsequently duly advertised and sold by the sheriff, and the bank bid them in for a nominal sum.

The petition charges that the bank purchased the lots with notice of the deed of trust and of the alleged error therein, and consequently with notice of the plaintiff's title and claim. This the answer denies, and the first inquiry respects the matter of fact thus put in issue by the pleadings. The plaintiffs seek to affect the bank with notice by showing actual notice to its agent. A notice is regarded in law as actual when the party sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information. (Speck v. Riggin, 40 Mo. 405; Wh. & Tud. Lead. Cas. Eq., 3d Am. ed., 152.) "Actual notice," says Selden, J., in Williamson v. Brown (15 N. Y. 359), "embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice." In the case last referred to, the rule is laid down that "where the purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser." "This presumption," as it is further held, "is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right notwithstanding the exercise of due diligence on his part." The evidence in the case at bar must be examined and applied in the light and under the guidance of these principles.

The evidence shows that William C. Applegate was the agent of the bank at Brunswick, and in charge of its business at that point; that prior to the execution sale, and a short time prior to the issue of said executions, he had an interview with John Knappenberger, who kept at Brunswick an abstract of all the records of conveyances of lands and town lots in the county of Chariton, in which Brunswick is situated. In the course of this interview

it appeared that Applegate's attention had been called to the fact that the deed of trust to Rhodes did not cover the lots in block 7, which were owned by Outcalt, and that such fact was a subject of conversation between them. Knappenberger's abstract showed that the deed covered lots 10, 11 and 12, in block 6, on which was situated the residence of one Manzey; and that it did not cover lots 10, 11 and 12, in block 7, on which was situated Outcalt's residence. In the course of the interview Applegate inquired of Knappenberger "if the abstract might not be wrong and not the deed," showing that in his view the deed was wrong if the abstract was right. It further appears that these two parties, a short time before the executions were issued, met again, and this time at the county seat where the records were, and that Knappenberger called Appleton's attention to the state of the records, and to the fact that the record of the deed of trust agreed with the former's abstract; thus showing that the abstract was correct, and that the error, according to Mr. Applegate's reasoning, was in the deed. Did Mr. Applegate make any further inquiry as to the facts of the transaction? He was the agent of the bank at Brunswick, and the executions were soon after issued and levied on the lots in block 7. Mr. Applegate clearly was in possession of facts which should have put him upon very diligent and careful inquiry. He knew that Outcalt's deed of trust, instead of conveying the grantor's property, assumed to convey the property of one of his neighbors. It was not strange that an error should have occurred in giving the number of the block; and Applegate had the best of reasons for his supposition that there was something wrong about the deed. If he made the proper inquiries in the proper quarter, he must be presumed, in the absence of evidence to the contrary, to have ascertained the facts. If he neglected all inquiry the fault was his own, and his principal can derive no advantage from his negligence. Mr. Applegate might possibly throw some light on this subject, but he was not produced upon the stand, nor is his absence in any way explained or accounted for. His non-appearance is significant. My conclusion is that Applegate had what the law regards as actual notice of the error in the deed, and of

the plaintiff's right. Notice to him was notice to the bank. (LeNeve v. LeNeve, 2 Wh. & Tud. Lead. Cas. Eq. 127.)

But counsel insist that the plaintiffs are not entitled to the relief sought, notwithstanding the notice. It is true that this contest is between creditors, and it is therefore urged that their respective equities are equal, and that a court of equity will not interfere in behalf of one set of creditors against another having equal equities. There is force in this view; for it must be granted that in all cases of relief by aiding and correcting defects and mistakes in the execution of instruments and powers, the party asking relief must stand upon some equity superior to the party against whom he asks it. (1 Sto. Eq., 9th ed., § 176.) Have the plaintiffs, then, an equity superior to that of the bank? The case of Welton v. Tizzard, 15 Iowa, 495, is not distinguishable in principle from that now under consideration; and I cannot answer the question just raised better than by quoting at large the reasoning of Dillon, J., upon the point involved in the query. He says, in giving the opinion of the court in the case referred to: "The plaintiff is confessedly the first in point of time. His is the elder right. The debtor for a valuable consideration agreed to execute a mortgage (for the deed of trust may for the purpose of this suit and for convenience' sake be so called) on lands which he owned, not on lands which he did not own; that is, he agreed and undertook, though defectively in the case of a court of law, to bind these lands of his — to set them apart, specifically to appropriate them to the plaintiffs. Now, in equity he did thus bind, appropriate and set them apart. Therefore in equity, which deems as done that which the party agreed to do, the plaintiff had not only a mortgage, but a mortgage on the right land — upon the land intended. In equity the plaintiff did not, as contended, simply attempt to get a lien, but he actually secured a lien upon the parcels designed to be conveyed to him; and not a lien merely, but his rights were such that he is regarded by the decisions of this court as he would be regarded by the decisions of other courts — in the light of a purchaser. (4 Iowa, 571; 11 Iowa, 174.) The debtor was bound in conscience to correct the mistake. His obligation to correct it was such an equity as would

bind his heirs, voluntary grantees, or purchasers with notice. Such are the plaintiff's rights. Now the defendant is subsequent in point of time. He has no specific lien. He takes just what the statute gives him, for judgment liens are wholly created and regulated by statute. Unlike the plaintiff, he had no agreement with the debtor for a lien on this property. Unlike the plaintiff also, he has no special tie which binds — no equity which fastens itself upon and clasps the specific property. He has a lien at large — a mere right to acquire a right to this property by a levy and sale. His rights, before a sale without notice, are co-extensive only with those of the debtor. He comes in under the debtor; that is, under one who is in conscience bound, and who in equity would be compelled, to rectify the error in the antecedent conveyance. The equities of the parties are not equal either in point of time or point of right."

The views above expressed by Judge Dillon are in all respects applicable to the case now under review, and they are views abundantly sustained by adjudicated cases. (See authorities cited in the opinion, particularly the New York cases, and White v. Wilson, 6 Blackf. 448.)

The equity, then, of the plaintiffs in this suit is superior to that of the bank, and must prevail. The judgment of the court below, which is based on a contrary view, must be reversed and the cause remanded. The other judges concur.

THE STATE OF MISSOURI *ex rel.* KIDDER SCHOOL DISTRICT, Respondent, *v.* P. S. KINNEY *et al.*, Appellants.

1. *Schools — Taxes — Laws in force in 1868 authorized school corporations to include as taxable merchants' statements.* — Under the laws in force in 1869 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7-9; see also *id.* 1246, § 18, and 1243, § 6), school corporations in towns and villages were authorized to include merchants' statements as taxable, and to collect school taxes upon such statements.

The State of Missouri ex rel. Kidder School District v. Kinney et al.

Appeal from Caldwell Circuit Court.

Crosby Johnson, for respondent.

James McFerran, for appellants.

There was no law in force in the year 1868 or 1869 authorizing school corporations in towns or villages to include as taxable merchants' statements, or authorizing collectors to collect school taxes on such statements for such corporations; and no reference is made in the petition to any statute authorizing the assessment of such statements for such purposes.

BLISS, Judge, delivered the opinion of the court.

This suit was brought upon a bond executed by defendants for a merchant's license issued to defendant Kinney, upon his refusal to pay to the county collector an assessment of taxes made by the school district for school purposes. The petition sets forth the bond, the statement, the demand and refusal to pay the tax, with other appropriate averments, and claims a liability (under Gen. Stat. 1865, ch. 93, § 11; Wagn. Stat. 939) in damages for double the amount of the tax. Defendant demurred, the demurrer was overruled, and judgment was rendered against them.

The bond was executed in 1868, and the statement of his goods was filed with the county clerk in 1869, and defendant's counsel claim that at that time there was no law in force authorizing school corporations in towns and villages to include as taxable merchants' statements, or authorizing the collection of school taxes upon such statements.

The bond is conditioned for the payment to the collector of all taxes which may be due at a certain time (Gen. Stat. 1865, ch. 93, § 5; Wagn. Stat. 938, §§ 4, 5), and the statements are to be filed with the county clerk, who shall enter an abstract thereof in the merchants' tax book, which shall show the aggregate amount of goods returned by each, and "the amount of each kind of taxes levied thereon, which shall be the same as the taxes for the time assessed upon real estate." (Sess. Acts 1868, p. 76; Wagn. Stat. 938–9, § 6.) No distinction is made

by this act between different kinds of taxes, but it is the clerk's duty to enter each kind opposite the aggregate amount of every merchant's statement and deliver the same to the collector. The act of 1867, concerning schools (pp. 161–2, § 7; Wagn. Stat. 1264, § 7) authorizes boards of education in towns and villages "to levy and collect taxes upon all property within the district," and provides (Sess. Acts 1867, p. 162, § 8; Wagn. Stat. 1265, § 8) that "the same assessment on property which shall be made from time to time for State and county purposes, shall be deemed and used as the lawful and proper assessment in levying and collecting the taxes and assessments authorized by this act." The board is not to provide for the collecting of the tax, but must cause "the rate of tax levied" for the year, together with the names of the tax-payers residing or owning property within the district, to be certified to the county clerk, who shall extend the taxes so levied upon the tax book before delivering the same to the collector; and it is made the duty of the collector to collect them in the same manner and under the same rules and regulations as provided for the collection of State and county taxes.

No more comprehensive language could be used than is contained in both acts. The one provides for entering in the merchants' tax book the amount of each kind of tax levied upon the goods, and the other provides that boards may levy taxes upon all property within the district, to be collected as State and county taxes. No exception is made, or exemption provided for, in favor of merchandise, either in the acts under consideration or in the general revenue law; nor can any be implied from the peculiar mode of ascertaining the taxable value of such merchandise.

In townships outside of the jurisdiction of town school boards, the taxes for each sub-district are collected by the township clerk; and in that case it becomes the duty of the proper county clerk to make a separate tax book for such township clerk. The statute points out the manner in which the separate tax book shall be made, and provides that the lands shall be arranged by themselves in numerical order, and the personal property, "including statement of merchants," in a separate list, in the alphabetical order of the names of the owners. (Wagn. Stat. 1246, § 18.) In assessing

taxes in a sub-district, the only provision is that they shall be assessed upon "the taxable property in said sub-district" (p. 1243, § 6), which must include, although it is not specified, the property embraced in merchants' statements. There is nothing in the law that in any manner intimates a different rule as to the property assessed within or outside the jurisdiction of organized school boards in towns and villages.

As the defendant's property was properly embraced in the assessment of taxes for school purposes, his bond was forfeited for refusing to pay them, and the judgment below is affirmed. The other judges concur.

WILLIAM O. BLANKENSHIP, Plaintiff in Error, *v.* NORTH MISSOURI RAILROAD COMPANY, Defendant in Error.

1. *Practice, civil — Supreme Court will not disturb verdict on questions of fact.* — In cases at law this court will not disturb the verdict of a jury where no legal questions have been raised.
2. *Bill of exceptions, what is not.* — A bill of exceptions which does not embody or set out the testimony, but only purports to state the substance of what was proved, is not properly a bill of exceptions at all.
3. *Practice, civil — Supreme Court — Bill of exceptions, refusal of court to sign — Affidavits filed in vacation, etc.* — A bill of exceptions left unsigned by the judge as being untrue and not signed by bystanders, but only accompanied by affidavits sworn to and filed in vacation, and that without any consent that the same should be filed out of time, is not such a bill of exceptions as the law (Wagn. Stat. 1043-4, §§ 28, 30, 32, 34) requires, and the affidavits will not be considered by the court.

Error to Clinton Circuit Court.

Vories & Vories, and *Birch*, for plaintiff in error.

G. W. Dunn, for defendant in error.

This court cannot regard the paper which purports to be a bill of exceptions, because it was not signed by the judge or by three bystanders, and because the affidavits filed in support of the same were not made under a state of facts which authorize the court to consider them. (Wagn. Stat. 1043-4, §§ 27-35.)

WAGNER, Judge, delivered the opinion of the court.

This action was originally instituted before a justice of the peace, and the complaint asked for double damages for the killing of a cow belonging to the plaintiff by the defendant. The justice gave judgment for the value of the cow, and refused to award double damages. The plaintiff appealed to the Circuit Court, where the same judgment was rendered. The record in this court presents nothing to be reviewed. There was no question of law raised or saved on the trial, and there is really no bill of exceptions. The cause was submitted to the court without the intervention of a jury. The evidence was all heard, and the court gave its verdict and judgment thereon. No instructions or declarations of law were asked; and we have so often decided that in such cases we will not examine or disturb the judgment, that it is a matter of some surprise that parties will persist in coming here on such a record.

The judge presiding at the Circuit Court refused to sign the bill of exceptions on the ground that the evidence was not correctly stated therein. The plaintiff's attorney then asked and obtained leave of the court to file the affidavit of bystanders in support of the bill in vacation, and within five days after the adjournment of the court. The bill does not embody or set out the testimony, but only purports to state the substance of what was proved; and the affidavit taken and filed in vacation states that the matters and facts in the bill of exceptions are true, and that the evidence was given.

This is no bill of exceptions, and there is no law for such a proceeding. The statute provides that the bill of exceptions shall be written out and filed at the time or during the term of the court at which it is taken, and not after. (Wagn. Stat. 1043, § 28.) This was always the rule at common law, but this court in numerous decisions has so far departed from the rule as to permit a bill of exceptions to be signed at a period subsequent to the term at which the trial takes place, when the consent of *both* parties is given to such a course, and that consent is entered of record. In this case the consent of both parties was not had. The practice act declares that if the judge refuse to sign any bill of excep-

tions, such bill may be signed by three bystanders who are respectable inhabitants of the State, and the court shall permit every such bill, if the same be true, to be filed in court. When the judge refuses to permit any bill of exceptions signed by the bystanders to be filed, and certifies that it is untrue, either party to the suit may take affidavits, not exceeding five in number, in relation to its truth. These affidavits are to be taken and deposited in the clerk's office within five days after the trial of the cause, and they form a part of the record on appeal or writ of error. (Wagn. Stat. 1044, §§ 30, 32, 33.) It is plain that the statute was not followed in any particular, and the affidavits filed with the clerk were not made under a state of facts authorizing this court to consider them.

Judgment affirmed. The other judges concur.

MARY C. ROGERS *et al.*, Plaintiffs in Error, *v.* CHARLES C. MILLER *et al.*, Defendants in Error.

1. *Partition — Petition for, failing to point out each interest, subject to demurrer.*—A petition in a suit for partition, which fails to set forth the ownership of each several interest in the land sought to be divided, and contains no averment that the owner was unknown, or that there was any difficulty in pointing out the owner and defining his interest, is, under the statute (Wagn. Stat. 967, § 8), demurrable for that reason.

Error to Clinton Circuit Court.

Birch, and *Vories & Vories*, for plaintiffs in error

The petition alleges that the plaintiffs and defendants — that is, those whose husbands are joined with them — are the owners of said land, that they hold it in common; and then again it is stated that each owns one-fifth part by an estate of inheritance in fee. These allegations of title are sufficient. It is not necessary to set forth the manner in which the title is derived, or to state the mere evidence in the cause. (Bradshaw v. Callaghan, 8 Johns., N. Y., 558; 3 Paige Ch. 242; See & Bro. v. Cox, 16 Mo. 166; Page v. Freeman, 19 Mo. 421; Saunders v. Anderson, 21 Mo. 402.) In the case of Holmes v. McGee, 27 Mo. 597,

the petition was not so specific as the petition in this case, and yet the court held it to be sufficient. (See Whittel's Pr. 166; Abbott's Forms, tit. Partition; 2 Van Santv. Eq. Pl. 17.)

Woodson, Vineyard & Young, for defendants in error.

It is submitted that the petition to which the demurrer was sustained was radically defective under the act regulating suits for partition (2 Wagn. Stat. 967, § 3). From the petition it appears that there is one undivided fifth part of said real estate that is not owned by the five persons last named. The petition should state fully the title of each and all of the owners of said property.

CURRIER, Judge, delivered the opinion of the court.

A demurrer to the petition was sustained, and the plaintiffs bring the cause into this court by writ of error. The suit was for the partition of real estate. The petition shows that the parties to the suit held the estate as tenants in common; that the plaintiffs, Mary A. Rogers and Martha J. Dickinson, were the owners in fee of one undivided fifth of the premises, and that the defendants, Charles C. Miller, Daniel E. Miller and George R. Miller, were the owners in fee of three-fifths, each holding one-fifth. The petition makes no reference to the remaining fifth. The statute (2 Wagn. Stat. 967, § 3) requires that the "names, rights and title of all the parties interested" in the estate sought to be divided shall be set out "so far as the same can be stated." The petition before us does not do that; it is entirely silent as to one undivided fifth part of the premises proposed to be partitioned. There is no averment that the owner was unknown, or that there was any difficulty in pointing out the owner and defining his interest. The petition is defective in its treatment of this fifth interest. Apparently the error arises from assigning one-fifth to Mrs. Rogers and Mrs. Dickinson jointly, instead of assigning one-fifth to each of them. The plaintiffs should have confessed the demurrer and taken leave to amend. They chose, however, to stand by their defective petition, and the judgment declaring it insufficient must be affirmed. The other judges concur.

THOMAS PETTIGREW, Defendant in Error, *v.* DAVID H. LANCY, Plaintiff in Error.

1. *Unlawful detainer—Worm fence partly resting on land of adjoining proprietor, etc.* —Where one erects a worm or Virginia fence to separate his land from that of an adjoining owner, half of the width of the fence may rest upon the land of the latter, the fence being of suitable dimensions; and unlawful detainer will not lie against the builder for the land so occupied beyond the dividing line.

Error to Andrew Circuit Court.

H. S. Kelley and *J. J. Davis*, for plaintiff in error.

A partition or division fence may be made of rails in the form of a worm fence, one-half on either side of the mathematical or air line, and the owner or builder of the fence is not a trespasser, nor does he hold the land on which the fence stands adversely to the rights of the adjacent owner. (Dysatt v. Leeds, 2 Barr, 488; U. S. Dig. tit. Fences, 274, §§ 4, 5; 18 Barb., N. Y., 397; Newall v. Hill, 2 Metc., Mass., 180; Sparhawk v. Twitchell, 1 Allen, Mass., 450.) Hence, the court should have refused the plaintiff's instruction and given the defendant's.

Heren & Reed, for defendant in error.

I. If the plaintiff in error had inclosed with his said fence into his own inclosure ten acres of the land of defendant in error, no one could doubt but that it would be an unlawful detainer under the circumstances in this case. Because this is a small strip of land it makes no difference.

II. The parties abandoned the idea and arrangement that this fence should stand on the line and be a division and partition fence—the said plaintiff in error, as is shown by his own evidence, being the first to do so; and the defendant in error acting upon the notice given him by said plaintiff in error, the dissolution of the partnership fence was complete. Hence the act entitled "An act concerning partition fences, and to encourage the growing of hedges as such," approved March 4th, 1869, does not apply. (Sess. Acts 1869, pp. 22, 23.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding under the statute for an unlawful detainer. It appears that the parties were adjoining land-owners, and built a division fence upon the line dividing their respective lots, each building half. The evidence tended to show that the center of the defendant's portion of the fence was upon the line separating the lots, the angles or corners of the fence projecting upon the adjoining ground. The fence was what is described as a worm or Virginia fence. It further appeared in evidence that six months prior to the institution of the suit, the plaintiff gave the defendant notice to remove so much of his fence as rested upon the plaintiff's lot.

At the trial the court instructed the jury for the plaintiff, upon the theory that the defendant had no right to build or continue any portion of his fence upon the plaintiff's ground in the manner indicated in the evidence, and refused to instruct for the defendant upon the opposite theory. The instruction refused directed the jury to find for the defendant if they were satisfied from the evidence that the fence served as a division fence, was such as a good husbandman ought to build and maintain, and was erected as nearly as practicable upon the line dividing the lots of the parties, no more of it projecting upon the plaintiff's than upon the defendant's land.

The action of the court in giving the plaintiff's instruction and refusing that of the defendant was clearly erroneous, and must have misled the jury as to the law of the case. It is very well settled that, in the erection of division fences, half the width of the fence may rest upon the ground of each adjoining proprietor, the fence being of suitable dimensions. The rule applies to the worm or Virginia fence. (1 Wagn. Stat. 706, §§ 1, 2; Sess. Acts 1869, pp. 21, 22; Warren v. Hill, 2 Metc. 180; Ferris v. Van Buskirk, 18 Barb. 307; Sparhawk v. Twitchell, 1 Allen, 450.) But the court instructed the jury upon an opposite view of the law.

It is suggested, however, that the fence in question, although originally a proper division fence, had ceased to be such in con-

sequence of the action of the defendant. There was evidence tending to show that the defendant, prior to any action being taken by the plaintiff, notified the latter to remove his half of the fence from the defendant's land — that is, that portion of the line of fencing which belonged to the plaintiff—and there was evidence tending to show that the plaintiff had in fact so removed it. It is urged that this action of the parties — the defendant giving the notice and the plaintiff acting upon it — entitled the plaintiff to exclude every portion of the defendant's fence from the plaintiff's land. Whatever there may be in this view, it is sufficient to say that the plaintiff's instruction given by the court embodied no such theory of the law. It directed the jury to find for the plaintiff independently of the fact upon which the theory rests.

The judgment will be reversed and the cause remanded. The other judges concur.

JAMES HEDGES, Plaintiff in Error, *v.* THE NORTH MISSOURI RAILROAD COMPANY, Defendant in Error.

1. *Practice, Supreme Court — Law points not saved and no bill of exceptions, judgment affirmed.* — Where no questions of law are raised, and no bill of exceptions is preserved, the judgment will be affirmed.

Error to Clinton Circuit Court.

Birch, and *Vories & Vories*, for plaintiff in error.

George W. Dunn, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The record in this case presents essentially the same state of facts that was exhibited in the case of Blankenship v. North Mo. R.R., *ante*, p. 376. There are no questions of law raised or saved at the trial, and no bill of exceptions preserved.

Judgment affirmed. The other judges concur.

JOSEPH B. KIRK, Respondent, *v.* ANDREW A. SPORTSMAN, Appellant.

1. *Practice, civil — Trial — Jury — Weight of evidence.* — The jury are the proper judges of the weight and reliability of evidence.
2. *Constable, collections by — Statute of limitations begins to run, when.* — The cause of action against a constable for failing to account for moneys collected by him, does not accrue so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties, or until the officer has made a proper return or report showing that the money had been realized.

Appeal from Livingston County Common Pleas.

Broaddus and *Pollard*, for appellant.

L. T. Collier, for respondent.

This suit was not on the bond of appellant as constable, and clearly respondent's cause of action did not accrue until he made demand of appellant for the money he had collected.

WAGNER, Judge, delivered the opinion of the court.

The jury were the proper judges to determine the weight and reliability of the evidence, and by their verdict for the plaintiff they must have found that the plaintiff placed the note in the hands of the defendant, a constable, for collection, and that he collected the money and failed to pay it over. There is no objection to the instructions when taken together. They presented the law fairly enough. The whole question was principally one of fact, and one clear and intelligent instruction would have subserved the purpose of enlightening the jury far better than the confused mass offered by the parties and given by the court. However, we see nothing about them calculated to mislead, and the verdict is amply supported by the testimony.

The only point of law raised requiring any attention is the defendant's plea of the statute of limitations. The plaintiff gave the defendant the note to collect in 1861, and he collected it in a short time thereafter. The plaintiff soon afterward left this

State and became a resident of the State of California, and did not return till June, 1869. He was not advised of the collection of the note till after his return, and then the defendant refusing to pay when a demand was made, he commenced this suit. It seems that the note was collected without legal process, and consequently there was no return or report to any court showing that the money was realized.

The question is whether in such a case the defendant can avail himself of the statute of limitations as a bar. In a recent case in this court involving the same principle we held that the cause of action did not accrue, so as to put in motion the statute of limitations, until there had been either a demand of payment by the parties in interest, or until the officer had made a proper report or return showing that the money had been realized. (State *ex rel.* Winburn v. Minor *et al.*, 44 Mo. 378.) That case is decisive, and rules the point against the defendant.

Judgment affirmed. The other judges concur.

LOUIS SPRINGER, Respondent, *v.* SULLIVAN COUNTY, Appellant.

1. Finney v. Sullivan county, *ante*, p. 350, affirmed.

Appeal from Sullivan Circuit Court.

Eubanks & Butler, for respondent.

G. D. Burgess, for appellant.

CURRIER, Judge, delivered the opinion of the court.

The decision just rendered in Finney v. Sullivan County determines the disposition to be made of this cause. The cases are not distinguishable in principle. The judgment, which was in favor of the plaintiff, will be reversed. The other judges concur.

CARROLL COUNTY, Appellant, *v.* JAMES A. CHEATHAM *et al.*, Respondents.

1. *County, suit by to collect money — Payment may be made to plaintiff's attorney without special authority given him to institute suit.* — In suit by a county for the collection of money, payment may be made by defendant to the lawfully authorized agent and attorney of the county, without proof of any special authority conferred upon the attorney to institute the suit. He was warranted in receiving the money sued for as in other cases.

Appeal from Chariton Circuit Court.

C. A. Winslow, for appellant.

I. In making the payment relied upon, defendant was acting in pursuance of his previous obligation to pay under the statute — an obligation voluntarily assumed; and if he made the payment contrary to the statute, or to an unauthorized person, he acted at his own peril.

Among the county officers selected by the Legislature to manage the school funds (see art. II, p. 1419, R. C. 1855) county attorneys are nowhere to be found. They are not specially mentioned in the statute, and no duties have been assigned them in the premises. The Legislature ignored them altogether.

Defendant obligated himself as a part of the contract to pay the borrowed money back into the county treasury. He cannot discharge himself by showing that he paid it to the county attorney instead of the treasurer.

II. Troxell, as county attorney, by virtue of his official position alone, without especial authority conferred on him, had no authority to commence the attachment suit. The county attorney is an officer of the county, and the management of these funds is not vested in the county, but in the County Court as agent of the State. The county has no agency in the premises, and the official relations of the county attorney are to the county. The county is only selected for prudential reasons as the nominal plaintiff in suits on the bonds, the nominal obligee in them, and has no personal interest in the funds or their management, and no active duties to perform.

H. Tutt, for respondents.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues on three $100 notes given to the county upon the loan of school moneys. The execution of the notes is admitted, and the defendants plead payment in bar of the action. At the trial evidence was given tending to show that the same notes were previously sued upon in an attachment against Cheatham, who was the principal in the notes. There was also evidence tending to show that the County Court of Carroll county assented to the notes being placed in the hands of Troxell, the county attorney, for the purposes of such suit, but upon the condition that one of Cheatham's sureties, who desired the suit to be instituted, should pay all costs and expenses attending it. There was also evidence tending to show that Cheatham, subsequently to the institution of the attachment suit, paid the full amount due upon the notes to Troxell, the county attorney, and the attorney of record in the suit. Under the evidence the court refused to instruct the jury that Troxell had no authority to receive the money, or that the payment to him was unwarranted, unless the County Court of Carroll county *especially* authorized the institution of the attachment suit. It did instruct the jury, however, and at the instance of the plaintiff, that the supposed payment was wholly unwarranted and invalid unless the jury should find from the evidence that Troxell, at the time said payment is claimed to have been made, was the lawfully authorized agent and attorney of the plaintiff to bring the attachment suit and collect the money due on said bonds (notes); and further, that the verdict must be for the plaintiff unless the jury found the further fact that the defendants, or some one in their behalf, "actually and in good faith paid in money the amount of said bonds and the interest due thereon." I think the instructions given fairly presented the plaintiff's case on the issue of payment, and that those refused were properly refused.

There is nothing in the statute to which the plaintiff's counsel refers (R. C. 1855, ch. 143, art. II) that has any bearing on

the point here involved. The county, like any other party, was warranted in appearing and acting through its attorney of record, and the attorney was warranted in receiving the money sued for as in other cases. I have examined all the instructions asked by the plaintiff and refused by the court, as also those given at the instance of the defendants, to which the plaintiff objects. I find nothing in them to warrant a disturbance of the judgment, and see no sufficient occasion for reviewing them in detail. As already remarked, the plaintiff has no substantial ground of complaint because of the action of the court in placing before the jury the law in relation to Troxell's agency and upon the issue of payment.

The judgment will be affirmed. The other judges concur.

PRIOR N. NORTON, Respondent, *v.* HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Railroad — Damages, action for before justice of peace — Averments in.*— In an action against a railroad company, under section 43, chapter 63, Gen. Stat. 1865, before a court of record, for damages to stock, it should appear among other things that the stock strayed on the road through defects of cattle-guards at a road-crossing, or in consequence of the absence of fences which the railroad company was bound to build. But in such action before a justice of the peace, the statement will be sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to make the judgment a bar to another suit, although it fail to set forth the averments above mentioned.

Appeal from Caldwell County Circuit Court.

Hall & Oliver, for appellant.

The original paper filed with the justice fails to be "a statement of facts constituting the cause of action," as expressly required where the suit is not founded on an account or instrument of writing. Neither the statement nor the amended statement sets forth the facts necessary to entitle plaintiff to double damages under the statute. There is no allegation that the cow

in suit got on the track of the railroad in consequence of the failure of defendant to construct or maintain fences or cattle-guards. In cases of this sort, all the circumstances essential to support the action should be alleged, or appear in substance on the face of the statement. (45 Mo. 371.) Our statute is express that the damage for which double damage may be given should be occasioned by the failure to construct or maintain fences or cattle-guards. (Wagn. Stat. 310–11, § 43.)

Richardson, and *Vories & Vories*, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought suit before a justice of the peace, and filed the following as his "statement of facts constituting the cause of action," as required by the statute. "Plaintiff states that defendant, by its agents, engine and cars, on the 6th day of April, 1869, on its road, about one mile east of Kidder, in Hamilton township aforesaid, at a point on said road where the same was not fenced by defendant, did strike, bruise, wound and kill a white cow, the property of plaintiff, aged about five years, and worth seventy-five dollars. Plaintiff therefore states that by virtue of the statutes of the State of Missouri, as found in Gen. Stat. 1865, chapter 63, entitled 'Of Railroad Companies,' and especially by the forty-third section of said chapter, pp. 342 and 343, he is entitled to double the amount of seventy-five dollars,' etc. The plaintiff obtained judgment for $75 only, and appealed to the Circuit Court, and there defendant moved to dismiss the case for want of a sufficient statement of facts. The motion was overruled, the plaintiff amended his statement, and obtained judgment for $150, double the damages suffered.

It does not become necessary to consider the amended statement, for if the original was insufficient there was nothing to amend by. That this statement would be insufficient as an original petition in a court of record is very clear, inasmuch as it lacks averments necessary to bring the pleader within the statute. It should appear among other things that the cattle strayed on the road through the defect of cattle-guards at a road-crossing, or

in consequence of the absence of fences which the railroad company was bound to build. (Cecil v. Pacific R.R. Co., 47 Mo. 246.) But we are not to consider what should be averred and proved in a court of record, but what kind of a statement of facts is required by the statute in an action before a justice of the peace. This subject has been frequently before us, and our holding has been uniform. All the averments of an original petition are not required, but the statement will be sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to make the judgment a bar to another action. (Iba v. Hann. & St. Jo. R.R. Co., 45 Mo. 469; May v. Kloss, 44 Mo. 300; Brashears v. Strock, 46 Mo. 221; Burt v. Warne, 31 Mo. 296; Coughlin v. Lyons, 24 Mo. 533.) Tested by the principles laid down in these decisions, the statement above quoted must be held to be sufficient. It is not possible to mistake the nature of the claim, or, if adjudicated, again to bring suit upon it; and to hold it insufficient would be to require that a statement before a justice of the peace should contain all the material averments necessary in a petition.

The other judges concurring, the judgment will be affirmed.

DABNEY N. PRICE, Plaintiff in Error, *v.* NORTH MISSOURI RAILROAD COMPANY, Defendant in Error.

1. Blankenship v. North Mo. R.R. Co., *ante*, p. 376, affirmed.

Error to Clinton Circuit Court.

Birch, and *Vories & Vories*, for plaintiff in error.

G. W. Dunn, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The record in this case does not differ from the one in the case of Blankenship v. North Mo. R.R. Co., *ante*, p. 376, and for the reasons stated in that case, the judgment herein will be affirmed. The other judges concur.

THE STATE OF MISSOURI, TO USE OF J. B. NEAL, Plaintiff, *v.* SALINE COUNTY COURT, Defendant.

1. *Railroad — Saline county railroad bonds issued without popular vote specifying the amount — Innocent holders protected.*—Under the act of January 22, 1861 (Sess. Acts 1860-1, p. 455), the County Court of Saline county could issue railroad bonds for the Lexington & St. Louis Railroad Company only upon popular vote "specifying the amount" to be issued. (45 Mo. 242.) And the company, being a direct party to the bonds, could enforce their payment only after such vote had been taken. But when the question of the issue of the bonds had been submitted to vote, and a majority had voted for the issue, and the bonds on their face showed a compliance with the act, and said bonds had been negotiated by the county in the construction of the road, purchasers would not be required to look further, and would be entitled to *mandamus* to enforce the payment of said bonds, even though the vote in fact failed to "specify the amount" as required by law.

The general rule is that where the statute gives authority to contract a debt on specified conditions, their performance is necessary to support the authority; and in a direct proceeding to prevent the consummation of the contract, the substantial performance of every radical condition may be insisted on. But when the contract is completed, and the rights of innocent third parties supervene, the rule is relaxed. And in such case, where an attempt has been made to comply with the condition specified, and the bond or other instrument indicates a compliance therewith, the innocent purchaser will be protected.

Petition for Mandamus.

Amos Green & T. A. Green, for plaintiff.

The bonds are duly issued and signed by the presiding justice of the County Court, and attested by the clerk under the official seal of the county, and recite on their face that they are issued under and pursuant to the provision of the act of the Legislature, reciting its date, etc., and having passed into the hands of innocent purchasers for a valuable consideration, it is too late to set up or show informality in the issuing of them, or that the vote was not had in conformity with the requirements of the law. The bonds on their face import absolute verity, and the county and district are estopped from setting up any failure on their part to comply with the law. (Bissell *et al.* v. The City of Jeffersonville, 24 How. 287.)

J. P. Strother, for defendant.

No one could be an innocent purchaser, because in this case the bonds on their face referred to the special law and to the records of the County Court.

A purchaser was bound to look to both, and the records showed that the authority had not been pursued, and that the bonds were therefore invalid. (Sess. Acts 1860–1, p. 455; 2 Redf. Railw. 403; 27 Penn. 389; 23 N. Y. 449; 24 How. 298; 45 Mo. 246–8; Marsh v. Supervisors of Fulton County, 10 Wall. 676.)

It does not appear that the County Court of Saline county issued these alleged bonds. They were executed by the presiding justice and clerk without authority.

Even if one could be an innocent purchaser in such a case as this, the burden of proof would be on plaintiff, and he has failed to show his innocency by satisfactory evidence.

BLISS, Judge, delivered the opinion of the court.

In the State on the relation of the Lexington & St. Louis R.R. Co. v. Saline County Court, reported in 45 Mo. 242, an application was made for a *mandamus* compelling defendant to deliver to the relator certain bonds, and to assess taxes to pay the interest upon other bonds that had been delivered. The application was denied upon the ground that the law authorized the issue of the bonds only upon a vote of the people of the portion of the county interested, "specifying the amount" to be issued; that the vote did not specify the amount, and that the records of the court showed the defect. We did not say what might have been our opinion had the bonds that were issued gone into circulation and been in the hands of innocent holders.

The present relator represents that $1,200 of those bonds had been actually negotiated by the county in the construction of their road, and have been purchased and are now held by him, and he asks for a *mandamus* to compel the County Court to levy a tax to pay the same. The record shows the same state of facts

exhibited in the former case, with the addition only of the transfer of the bonds and their purchase by the relator.

The liability of municipal and of *quasi* corporations for the acts of their lawful agents in issuing negotiable bonds has been considered by this court upon various occasions, and the subject was elaborately discussed at our last March term in Steines v. Franklin County, *ante*, p. 167. The doctrines there affirmed have always been recognized by us, and are founded upon the broadest principles of justice. These bonds are treated like negotiable commercial paper, and after they have been transferred in the usual course of business the authority to execute and issue them is almost the only question open to consideration. The question of authority necessarily arises from the fact that they are executed by agents, and we have only to consider what constitutes authority.

The general rule is that when the statute gives authority to contract a debt upon specified conditions their performance is necessary to support the authority; and in a direct proceeding to prevent the consummation of the contract, the substantial performance of every radical condition may be insisted on. But when the law imposes such a condition upon the exercise of the power as a submission to a vote of the people, and an attempt has been made in good faith to comply with the condition, and it has been supposed by all parties to have been regularly complied with, the bond upon its face showing a compliance, strangers should not be required to look further. This class of bonds are negotiated by delivery; they go into market in distant States or foreign countries; and if the holder were required to show the regularity of all the proceedings, their negotiability would be greatly impaired or altogether destroyed, and the injustice to one who had received them, trusting to the truth of the recitals, would be very great. The purchaser in an eastern market may be satisfied as to the law—that the matter was submitted to the people, and that the county authorities acted upon that submission; but of the regularity of all the proceedings he cannot be advised without sending to a distant State and perhaps an obscure county, employing counsel to examine the records and poll-books, and then

he may be wrongly advised. The law throws no such burden upon him. He has trusted and he has a right to trust to the decision of the proper authorities, made when the bonds were issued, as to the regularity of the proceedings. Such decision radically differs from a naked usurpation of authority, and, as to strangers who trust to it, ought to bind the county.

Judge Nelson, in the case of Knox County v. Aspinwall, 21 How. 545, says: "The purchaser of the bonds had a right to assume that a vote of the county, which was made a condition to the grant of power, had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds." So broad a statement was uncalled for in the case then under consideration, and is inconsistent with our holding in Steines v. Franklin County, *supra*, and is also contrary to the decision in Marsh v. Fulton County, 10 Wall. 676. If the holder is to assume the vote from the mere issuing of the bonds, then the county would be prohibited from showing that there was no such vote, and county agents would be enabled to commit the grossest frauds by issuing them without any authority whatever; for the real authority comes from the people, and the statute only enables the people to bestow it.

When these proceedings were formerly under review, the application was first for an order upon the County Court to issue bonds to the railroad company that had been withheld; and, second, to provide for the payment of those in the hands of the company. These orders were refused because of the irregularity of the submission and vote. In view of such irregularity, it might have been the duty of the county authorities to refuse to proceed further; certainly this court would not compel the consummation of an erroneous proceeding. And so with the company. It was the payee, the whole proceedings were under the eye of its officers, and it was their duty, as representing the principal party in the transaction, to see whether the law had been complied with. The company stood in the relation of the original holder of negotiable paper who is advised of a want of consideration or other fact that would affect its validity.

In considering the subject reference was had to the case of

Mercer County v. Penn. & Erie R.R. Co., 27 Penn. St. 389, and we are now told that that case was reversed by Mercer County v. Hackett, 1 Wall. 83. This is a mistake. The remarks of the judges in the two cases may be inconsistent, but one is not a review of the other, and the points decided are consistent with each other. The former case was similar to the one in whose support it was cited; the bonds had not been negotiated, and in a direct proceeding the court enjoined their negotiation in consequence of irregularity in the action of the body who had power to confer the authority. The latter was a suit brought by an innocent holder of some of the bonds which had been negotiated, and the court sustained his claim upon very broad grounds, it is true, yet the actual decision was consistent with the former case, and consistent with our holding in 45 Mo.

In the case at bar we are to consider the question whether the submission to the popular vote, as provided by the statute, was so defective as to amount to no submission at all, or whether it was an error or irregularity of which the county authorities should have taken notice, but which — the election having been passed upon and approved by them — should not affect strangers. I am of opinion that as to those who have advanced their money on the faith of the action of such authorities, the townships interested in the railroad are concluded. A submission was had; a majority voted for the railroad, and there does not appear to have been any actual misunderstanding as to the object of the vote; no fraud is claimed; the County Court ignored the irregularity and issued the bonds; a few of them came into the relator's hands for value. Now, in all honesty and fairness, should he suffer from the blunders of the court? Clearly not; but if there is any loss it should fall upon those who authorized the court to act for them, though the authority was more general and indefinite than the law contemplated.

It is said that the record showed the irregularity. This is true, and doubtless the equity of the relator would be stronger had it been otherwise. But, practically, it makes but little difference. Purchasers would ordinarily only inquire whether the law authorized the vote, and whether a vote had been taken. It is

very seldom that they inspect the record, or, if they should do so, that they would be able to detect the error. When these bonds were negotiated, it seems not to have been discovered by any one, even by those in charge of the record, and who participated in the proceedings; and it would be altogether wrong to punish the relator for not having found it out.

We are referred by respondent to the case of Marsh v. Fulton County, 10 Wall. 676, recently decided in the Supreme Court of the United States. The opinion is a clear one, and contradicts in effect the *dicta* of the judges in several of the other cases, and places the validity of county bonds upon satisfactory grounds. The law of Illinois authorized counties to subscribe to the capital stock of railroad companies, and pay for the same in county bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the county. The board of supervisors of Fulton county, answering to our County Court, submitted the question to the voters, whether the county should subscribe $75,000 to the capital stock of the Mississippi & Wabash Railroad Company, and, after the election, ordered the clerk to subscribe the stock and issue the bonds. Subsequently the Legislature changed the charter of this company, separated the road into three divisions, and authorized the stockholders in each division to elect separate boards, who should each manage its own division. After this separation the clerk made the subscription to the central division, and the court held that this division was a different corporation from the one to whose stock the board of supervisors, under the authority of the election, had ordered him to subscribe, and that the subscription was not authorized by the vote. It was a case where the people had authorized a subscription to the capital stock of one company, and no authority whatever was given to subscribe to that of another — an absence of authority, and not an irregularity in granting it.

The other judges concurring, a peremptory *mandamus* will issue.

DURHAM BECKETT, Plaintiff in Error, *v.* JAMES BECKETT, Defendant in Error.

1. *Trespass — Damage* quare clausum fregit *— Domestic stock — Allegations as to* scienter. — The doctrine is well settled that where an action of trespass or case is brought for mischief done the person or personal property of another by animals *mansuetæ naturæ*, such as horses, cattle, sheep and swine, the petition must show that the owner had notice of their viciousness before he can be charged for the mischief done, because such animals are not by nature fierce or dangerous. But an action of trespass done by such stock, by breaking and entering the close of another, need not allege that defendant knew of the propensity in them to wander and roam about, which would naturally produce such damage, because animals of that description are by nature notoriously prone to such habits, and defendant will be presumed to have known them. And any mischief done by them, after entering the close, may be alleged and recovered upon as aggravation.

Error to Linn Circuit Court.

A. W. Mullins, for plaintiff in error.

The defendant's bull, charged in the petition with having killed the plaintiff's horse, comes within one of the statutory exceptions to the common-law rule permitting domestic animals to roam at large. (Wagn. Stat. 134, § 5; Sess. Acts 1869, p. 80.) At the old common law every man was bound to keep his beasts within his own close, under the penalty of answering by distress or action for all injuries arising from their being abroad. (Rust v. Low, 6 Mass. 90–4; Bush v. Brainerd, 1 Cow. 78, note *a*; Dolph v. Ferris, 7 Watts & Serg. 367, 370.)

G. W. Easley, for defendant in error.

I. To make the defendant liable in this case it would be necessary to allege and prove notice or knowledge of the vicious disposition of his animal. (Lyke v. Van Leuven, 4 Denio, 127; 1 Comst., N. Y., 515; Page *et al.* v. Hollingsworth, 7 Ind. 317; Vrooman v. Lawyer, 13 Johns. 339; Campbell v. Brown, 19 Penn. 359; 22 Ill. 140.)

II. Our statute (Wagn. Stat. 134, § 5) does not change the rule of the common law. That statute gives no other remedy

than the one specifically provided; and even before such specific remedy can be followed, the owner, if known, must have notice.

The cases cited by the counsel for the plaintiff, where the owner has been held liable without knowledge of the vicious propensities of his animal, are all cases for trespass *quare clausum fregit*, where the killing of the animal is alleged in aggravation of the damages to the trespass; while the case at bar is simply for damages for the killing of the animal. For distinction made in such cases, see Lyke v. Van Leuven, 1 Comst., N. Y., 515.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff in his petition stated that on and prior to the 28th day of September, 1870, the defendant wrongfully and unlawfully permitted a vicious and dangerous bull, over one year of age, to run at large; and that on the day last aforesaid the said bull, while so running at large, came upon the premises of the plaintiff, and then and there gored and killed a gray mare belonging to the plaintiff, of the value of $100, for which amount judgment was prayed.

The petition was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment rendered thereon, and the cause is brought to this court by writ of error.

The only question in the case is, whether the failure of the petition to allege that the owner had knowledge of the vicious habits and propensities of the animal constitutes a fatal defect. This is a common-law action, and the statute which has been cited has no application. The general principle is that the owner of a domestic animal is not liable for the injuries which it may have committed unless he had notice of its vicious propensity, or that it was accustomed to do mischief. (Vrooman v. Lawyer, 13 Johns. 399; Lyke v. Van Leuven, 4 Denio, 127; 1 Comst., s. c., 515.) And the *scienter* must be alleged, and submitted as a question of fact for the consideration of the jury. (Campbell v. Brown, 19 Penn. St. 359.)

In an old case it was decided that a declaration, in an action on the case for an injury done by the defendant's dog, must state

that he knew the dog was of a mischievous nature, or had done mischief before. (Mason v. Keeling, 12 Mod. 332.) So it was held that an action on the case would not lie for keeping a mad bull, without alleging a *scienter*. (Buxentine v. Sharp, 3 Salk. 12.) Where the defendant's dog was under his wagon in the shed of an inn where the defendant was a guest, and bit the plaintiff, the innkeeper, while he was unhitching the horses to move them, it was held that whether the dog was or was not—*quoad* the master, who had tried to send him home—an involuntary trespasser, the defendant was not liable unless he knew that the dog was vicious, and the subsequent conduct of the dog was held not admissible to show his character. (Fairchild v. Bentley, 30 Barb. 147.) In the case of Lyke v. Van Leuven, *supra*, it appeared that the plaintiff and defendant were the owners of adjoining fields, and that the plaintiff's cow, with a calf newly brought forth, were found badly torn and mangled in the plaintiff's own field, and that they died of their injuries. The injuries were committed by the hogs of the defendant, which had left the defendant's field and come on the premises of the plaintiff. In delivering the opinion of the court, Beardsley, J., said: "There was sufficient evidence to warrant the jury in finding that the cow and calf were destroyed by the defendant's swine. But it was not shown that swine ordinarily have a propensity to attack and destroy animals in the condition of this cow and calf; nor was there any evidence that the defendant was aware of the vicious propensity, in this or any other respect, of these swine. For these reasons the plaintiff wholly failed to show any right of action against the defendant. The *scienter* is the gist of the action in these cases, and the principle applies to swine as it does to other domestic animals which are *mansuetæ naturæ*."

The doctrine is well settled and laid down in all the cases, that where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, cattle, sheep and swine, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration or

petition; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do without notice, on the ground that by nature such animals are fierce and dangerous.

Where animals commit a trespass by breaking and entering the close of another, and, while there, do mischief, an action will lie for the trespass, and the mischief or injury may be alleged and recovered upon as aggravation. It was upon this principle that the cases of Angus v. Radin, 2 South. 815, and Dolph v. Ferris, 7 Watts & Serg. 367, were founded. It proceeds upon the fact that the common law holds a man answerable not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many of such animals to roam and wander about, the owner is bound at his peril to see that they do not commit a trespass on the lands of another; and if they do, unless it is through a defect of fences of the latter which he ought to repair, the owner will be liable in trespass, though in fact he had no notice of such propensity.

I think the demurrer was well taken, and that the judgment should be affirmed. The other judges concur.

[END OF AUGUST TERM.]